[fols. a-1]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

Equity. No. 49014

Henry I. Quinn, George J. Mueller, Jr., Henry Orth, Jr., Caroline S. Orth, Edwin H. Bond, and Rachel R. Bond, Plaintiffs,

vs.

Proctor L. Dougherty, Sidney F. Taliaferro, and William B. Ladue, Commissioners of the District of Columbia, Defendants

[Caption omitted]

In the Supreme Court of the District of Columbia

[Title omitted]

Amended Bill for Injunction—Filed November 5, 1928

The Amended Bill of Complaint of Henry I. Quinn, George J. Mueller Jr., Henry Orth Jr., Caroline S. Orth, Edwin H. Bond, and Rachel R. Bond, respectfully states:

[fol. 2] 1. They are all citizens of the United States, and residents of the District of Columbia, and bring this suit in their own rights as owners of real estate and taxpayers in the District of Columbia, as hereinafter set forth, and also on behalf of other owners of real estate and taxpayers similarly situated who may wish to intervene as co-plaintiffs.

2. The defendants, Proctor L. Dougherty, Sidney F. Taliaferro, and William B. Ladue are all citizens of the United States, and residents of the District of Columbia, and are sued in their official capacities as Commissioners of the District of Columbia by reason of the matters and things hereinafter set forth.

3. Plaintiffs are all taxpayers of the District of Columbia, and are also owners of real estate in the District of

Columbia located in the immediate vicinity of 16th Street and Colorado Avenue Northwest, their respective ownerships being as follows:

Henry I. Quinn, Lot 807, in Square 2714, improved by dwelling occupied by himself and family as their home #1507 Gallatin Street;

George J. Mueller Jr., Lot 32, in Square 2714, improved by dwelling occupied by himself and family as their home #5201 Colorado Avenue;

Henry Orth Jr., Lot 810, in Square 2714, improved by dwelling occupied by himself and family as their home #1510 Hamilton Street;

Caroline S. Orth, Lot 24, in Square 2665, improved by dwelling occupied by her as her home #4821 Colorado Avenue;

Edwin H. Bond and Rachel R. Bond, Lot 22, in Square 2714, improved by dwelling occupied by them as their home #1516 Hamilton Street.

All of the said homes of the plaintiffs are high-class and wholly detached residences.

4. Each and all of the said Lots, and all other Lots in the vicinity of 16th Street and Colorado Avenue Northwest, are now, and have been continuously since the first zoning by the Zoning Commission of the District of Columbia under the Act of Congress approved March 1, 1920, duly zoned as "Residential" in the said Commission's division [fol. 3] of the District of Columbia into different Use Districts, pursuant to Section II of its Zoning Regulations duly adopted providing, under the title "Use Districts," as follows:

"In order to regulate the location of commerce, business, trades, and industries, and the location of all buildings designed or occupied for specified uses, the District of Columbia is hereby divided into use districts, of which there shall be four known as:

(a) Residential.
(b) First Commercial.
(c) Second Commercial.
(d) Industrial.

These districts are shown upon the map attached hereto, designated as the 'Use Map.'

Except as hereinafter provided, no building shall be erected or altered, nor shall any building or premises be used for any purpose other than is permitted in the use district in which such building or premises is located."

Nowhere in said Zoning Regulations is a fire engine house permitted in a Residential District, although it is permitted in the other Use Districts, namely, First Commercial, Second Commercial, and Industrial. Not only is each of plaintiffs' said real estate located in a wholly Residential Use District, as aforesaid, but in the first and highest grade or class thereof denominated in said Zoning Regulations as " 'A' Restricted-Area District" in which erections or alterations are permitted—

"for use only as a wholly detached single-family dwelling with two side yards, church, school, or passenger station,"

as expressly provided in Section XVa of said Zoning Regulations.

5. In the immediate vicinity of the said real estate owned by the plaintiffs as aforesaid lies the world famous Rock Creek Park, established under Act of Congress of February 27, 1890, which Act expressly declared the land taken and condemned for such purpose to be—

"perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people [fol. 4] of the United States, to be known by the name of Rock Creek Park."

Said Rock Creek Park has been actually established and in continuous use as such for more than a quarter of a Century, and includes, and has always included, as an integral part of it, the land at the northwest corner of 16th Street and Colorado Avenue Northwest. Said land at said northwest corner of 16th Street and Colorado Avenue Northwest is less than 100 feet away from the home of plaintiff Caroline S. Orth aforesaid, less than 200 feet away from the home of plaintiffs Edwin H. Bond and Rachel R. Bond aforesaid, about 225 feet away from the home of plaintiff George J. Mueller, Jr., about 300 feet away from the home of plaintiff Henry Orth, Jr., and about 300 feet away from the home of plaintiff Henry I. Quinn. The said portion of Rock Creek Park located at said northwest corner of 16th Street and Colorado Avenue, Northwest, as also the other land taken for the establishment of said Rock Creek Park, under the said Act of Congress, was acquired by and through condemnation proceedings instituted against the private owners of the land, and the title was taken subject to the trust aforesaid to set apart the land so taken "perpetually" "as a public park or pleasure ground," and subject to the easements thereby created and arising in behalf of the lands in the vicinity, including those now owned by these plaintiffs, and the consequent inability of the Governmental authorities to disregard the said trust and apply the lands constituting Rock Creek Park, or any portion thereof, to any other use at any time, unless by and through special condemnation proceedings to take and apply the land for a different use, which would require compensation to these plaintiffs for their easements aforesaid in consequence of the trust aforesaid.

6. The predecessor in title of these plaintiffs in the ownership of plaintiffs' aforesaid real estate at the time of the condemnation aforesaid for said Rock Creek Park, namely, Harriet S. Mathewson, was a party to said condemnation proceedings in respect of a tract of land owned by her a portion of which was taken for said Rock Creek Park and [fol. 5] the compensation awarded her for such portion took into consideration the trust aforesaid creating the easements aforesaid in behalf of the remainder of the tract, including the parts of said tract since acquired, and now owned, by these plaintiffs, through mesne conveyances from said Harriet S. Mathewson.

7. All of the plaintiffs established their homes aforesaid in reliance upon the Zoning Law and Regulations aforesaid, and also upon their right to the perpetual devotion of said Rock Creek Park, and every part thereof, to the purposes of the trust expressly declared in the aforesaid Act of Congress of February 27, 1890. Moreover, although one of the plaintiffs, namely, George J. Mueller, Jr., acquired his said home as an already completed structure, all of the other plaintiffs actually built their homes in reliance as aforesaid.

8. Notwithstanding, and in disregard of, the foregoing rights of these plaintiffs, the defendants are actually preparing to erect a fire engine house at the said northwest corner of 16th Street and Colorado Avenue on a portion of said Rock Creek Park. The architectural plans therefor have been completed, and advertising for bids has already taken place. In fact, said defendants are determined to make as much progress as possible upon such unwarranted and improper undertaking in advance of the convening of Congress, and thereby make it appear inexpedient to Congress to take the interfering action in the premises which may reasonably be expected of Congress upon this matter being called to its attention, as member- of both branches of Congress are prepared to do.

9. The defendants invoke, as their only claimed justification, for what they are planning to do as aforesaid, the following provision in the District of Columbia Appropriation Act of Congress of May 21, 1928, namely:

"The Commissioners of the District of Columbia are hereby authorized and directed to sell the property at the corner of Sixteenth and Webster Streets, heretofore acquired for a fire engine house site at public or private sale at not less than the purchase price paid therefor by the District of Columbia and pay the proceeds thereof into the Treasury of the United States, to the credit of the District of Columbia;
[fol. 6] And the Commissioners are hereby authorized and directed to erect a fire engine house, with furniture and furnishing for a fire engine company, at the northwest corner of Sixteenth Street and Colorado Avenue, on property belonging to the United States, and there is hereby set aside for such purpose a plot of ground running north from the junction of Sixteenth Street and Colorado Avenue, as now publicly owned, one hundred (100) feet on Sixteenth Street, thence west at right angles to the street, one hundred and sixty feet (160), thence south at right angles to the line of Colorado Avenue. The balance of the appropriations carried in the Acts of May 10, 1926, and March 2, 1927, for an engine house in the vicinity of Sixteenth Street and Piney Branch Road Northwest, is made available for the purpose aforesaid."

The last-quoted paragraph was inserted in said Appropriations Act by amendment submitted, for the first time, on May 17, 1928, in the last rush days of the First Session of the 70th Congress, and without the Members of either the Senate or the House knowing, or having their attention called in anywise to, the fact that the amendment was intended to divert a part of Rock Creek Park from Park purposes to general municipal purposes, nor was any opportunity afforded to call to the attention of the Members of either the Senate or the House the trust aforesaid attached to said Rock Creek Park by reason of the express provisions of the aforesaid Act of February 27, 1890.

10. The peace and quiet of plaintiffs' said homes will be seriously, continuously, and irreparably disturbed and interfered with, if the said engine house, with the noises necessarily incident to its conduct and operation, be permitted to be placed in such immediate vicinity of plaintiffs' said homes. Moreover, the desirability of plaintiffs' said properties for first class residence purposes will be greatly lessened, if not altogether lost, and the value of the same greatly depreciated and to an amount that cannot be accurately measured and determined, if the placing of said engine house be permitted to proceed.

11. The plaintiffs are advised, and therefore aver, that they have no adequate remedy except by injunction to protect and enforce their rights in the premises. They [fol. 7] are further advised and aver that their rights are as follows:

1. To have the defendants restrained and enjoined in the first instance for such reasonable time as will enable the Congress of the United States to correct the mistake aforesaid into which it was led, and inadvertently fell, in the closing days of the First Session of the 70th Congress, to the end not only that plaintiffs' rights may be protected but the taxpayers may be saved the inexcusable waste of public funds necessarily involved in the unseemly attempt of the defendants just before the reconvening of Congress to take the action contrived by them as aforesaid.

2. In the event that Congress may not itself correct its mistake aforesaid, then that the Court shall adjudge and determine (a) that the defendants can claim no protection

from the aforesaid provision in the said Appropriations Act, because it is of no force or effect to deprive the plaintiffs of their rights and easements derived under and by virtue of the aforesaid Act of February 27, 1890, and also (b) that the aforesaid provision in said Appropriations Act is also of no force or effect to deprive the plaintiffs of their rights as aforesaid under the Zoning Law and Regulations, and that the location of a fire engine house so near to plaintiffs' said homes would be such an arbitrary and unreasonable act as not to comport with the necessary requirements of the situation in dealing with a Zoning Law, which Congress itself is bound to respect until the same shall be repealed altogether by Congress.

Wherefore, the premises considered, plaintiffs pray:

1. That process issue against the defendants, and each of them, requiring them to answer the exigencies of this amended bill of complaint, but not under oath, answer under oath being hereby expressly waived.

2. That the defendants, and each of them, be restrained pendente lite, and permanently, from erecting, or causing to be erected, a fire engine house upon the plot of ground referred to in this amended bill of complaint.

[fol. 8] 3. And for such other and further relief as the nature of the case may require and to the Court may seem proper.

Henry I. Quinn, George J. Mueller, Jr., Henry Orth, Jr., Caroline S. Orth, Edwin H. Bond, Rachel R. Bond, Plaintiffs, by Burkart & Quinn, Henry I. Quinn, Geo. E. Sullivan, Their Attorneys.

Duly sworn to by Henry I. Quinn. Jurat omitted in printing.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ANSWER TO AMENDED BILL FOR INJUNCTION—Filed June 28, 1929

* * * * * * *

Come now the defendants, Proctor L. Dougherty, Sidney F. Taliaferro and William B. Ladue, Commissioners of the

District of Columbia, and for answer to the amended bill for injunction heretofore filed herein, answering, say:

1-4. That they admit the allegations contained in paragraphs one, two, three and four of said amended bill for injunction.

5. Defendants admit that Rock Creek Park lies in the vicinity of the real estate owned by plaintiffs. They admit that, among other things, the Act of Congress, approved [fol. 9] February 27, 1890, contains the language quoted in paragraph five of said amended bill. Defendants admit that Rock Creek Park has been actually established and in continuous use as such for more than a quarter of a century and includes and has always included the land at the northwest corner of Sixteenth Street and Colorado Avenue, Northwest. Defendants admit that the land at said northwest corner of Sixteenth Street and Colorado Avenue is less than one hundred feet away from the home of plaintiff Orth, less than two hundred feet away from the home of plaintiff Bond, about two hundred and twenty-five feet away from the home of plaintiff Orth, Jr., and about three hundred feet away from the home of plaintiff Quinn. Defendants admit that the land taken from the portion of said park at the northwest corner of Sixteenth Street and Colorado Avenue was acquired by condemnation proceedings; but defendants say that whether the title was taken subject to any trust to set apart the land taken as a public park or pleasure ground, or whether title was taken subject to any easements created or arising in behalf of the lands in the vicinity, or whether the government authorities were or were not able to disregard such trust (if any trust existed) and apply the lands constituting Rock Creek Park to any other use, or whether compensation would be required for the application of such park to any use, are all conclusions of law and require no answer from these defendants.

6. That defendants have no knowledge of whether Harriet S. Mathewson was predecessor in title of plaintiffs' property and therefore can neither admit nor deny the same, but if such be material demand strict proof thereof. As to whether the compensation awarded said Mathewson

for the land taken for Rock Creek Park took into consideration any trust or easement in behalf of the remainder of the tract, these defendants are advised that such allegation is a matter of law and requires no answer from them.

7. Defendants have no knowledge of whether plaintiffs established their homes in reliance upon the zoning laws and regulations or upon the right to the perpetual devotion of Rock Creek Park to the purpose of any trust as is in paragraph seven of said amended bill alleged, but defendants deny the materiality of such allegations. On the other [fol. 10] hand, should such facts be deemed material, defendants demand strict proof thereof.

8. Defendants admit some of the allegations of paragraph eight of said amended bill but deny that they are acting in disregard of any of plaintiffs' rights and deny that such undertaking is unwarranted or improper, but say that said acts are being undertaken under the provisions of an Act of Congress approved May 21, 1928.

9. Defendants admit the allegations of paragraph nine of said amended bill, except those contained in the concluding sentence thereof. Defendants say that they have no knowledge of the matters and things set forth in said concluding sentence and therefore can neither admit nor deny the same, but they are advised and therefore aver that the allegations in said concluding sentence are immaterial and require no answer from them.

10. Defendants deny that the peace and quiet of plaintiffs' homes will be seriously, continuously, or irreparably disturbed or interfered with if an engine house is placed as authorized by said Act of Congress, and defendants say that any depreciation in value or desirability of plaintiffs' property, if any there be, is, as a matter of law damnum absque injuria.

11. Answering paragraph eleven of said bill, defendants are advised that the allegations in said paragraph contained comprise conclusions of law and arguments and require no answer from them.

Further answering said bill defendants say that they intend to erect an engine house on property belonging to the United States at the Northwest corner of Sixteenth Street and Colorado Avenue, and that their endeavor to carry out such undertaking is by virtue of the authority contained in the Act of Congress approved May 21, 1928, which provides:

"The Commissioners of the District of Columbia are hereby authorized and directed to sell the property at the corner of Sixteenth and Webster Streets, heretofore acquired for a fire engine house site at public or private sale at not less than the purchase price paid therefor by the District of Columbia, and pay the proceeds thereof into the Treasury of the United States, to the credit of the District of Columbia.
[fol. 11] And the Commissioners are hereby authorized and directed to erect a fire engine house, with furniture and furnishing for a fire engine company, at the northwest corner of Sixteenth Street and Colorado Avenue, on property belonging to the United States, and there is hereby set aside for such purpose a plot of ground running north from the junction of Sixteenth Street and Colorado Avenue, as now publicly owned, one hundred (100) feet on Sixteenth Street, thence west at right angles to the street, one hundred and sixty feet (160), thence south at right angles to the line of Colorado Avenue. The balance ofthe appropriations carried in the Acts of May 10, 1926, and March 2, 1927, for an engine house in the vicinity of Sixteenth Street and Piney Branch Road Northwest, is made available for the purpose aforesaid."

And now having fully answered, these defendants pray that the bill be dismissed and that they be discharged hence with their costs in this behalf incurred.

Proctor L. Dougherty, Sidney F. Taliaferro, Commissioners of the District of Columbia.

Duly sworn to by Proctor L. Dougherty et al. Jurat omitted in printing.

[fol. 12] IN SUPREME COURT OF DISTRICT OF COLUMBIA

STIPULATION—Filed March 5, 1930.

* * * * * * *

It is hereby stipulated and agreed by and between the respective parties hereto, through their counsel, as follows:

1. The averments of paragraph six of the amended bill herein are hereby agreed to be true and correct in all matters of fact, but the ultimate question of whether the compensation awarded Harriet S. Mathewson took into consideration a trust creating easements in behalf of the remainder of the tract not taken in the Rock Creek Park condemnation is recognized by all parties hereto to involve a matter of law.

2. Although the defendants do not admit the materiality of the averments contained in paragraph seven of the amended bill, nor do they admit that there was any basis in law for the belief in and reliance upon the Zoning Laws and Regulations, and the Rock Creek Park Act, by the plaintiffs, defendants do not question that plaintiffs acted in reliance upon plaintiffs' supposed rights as claimed in said paragraph.

3. The defendants admit the averments of paragraph nine of the amended bill, reserving their objection, however, to the materiality of the matters averred in the last sentence of said paragraph.

4. The averments of paragraph ten of the amended bill shall not be construed as alleging that there is any plan or any purpose of subjecting plaintiffs' homes to any noises except such as are necessarily incident to the normal and usual conduct and operation of an engine house, and it is agreed that the question of how far the peace and quiet of plaintiffs' homes will be disturbed and interfered with in consequence thereof, constitutes wholly a matter of law.

Henry I. Quinn, Geo. E. Sullivan, Attorneys for Plaintiffs. William W. Bride, Alex. H. Bell, Jr., Attorneys for Defendants.

[fol. 13] IN SUPREME COURT OF DISTRICT OF COLUMBIA

FINAL DECREE FOR INJUNCTION—Filed March 5, 1930

* * * * * * *

This cause coming on to be tried upon the pleadings and the stipulation filed herein, and upon such evidence, if any, as either party should desire to offer and none such being adduced, and counsel for the respective parties having been fully heard, it is this 5" day of March, 1930, adjudged, ordered and decreed that the defendants, Proctor L. Dougherty, Sidney F. Taliaferro and William B. Ladue, Commissioners of the District of Columbia, and their successors in office, be, and they are hereby, permanently enjoined from erecting or causing to be erected a Fire Engine House upon the plot of ground located at the Northwest corner of 16th Street and Colorado Avenue, N. W., in the District of Columbia as more particularly described in the said amended Bill of Complaint;

And it is further adjudged and decreed that the plaintiffs recover of the defendants their costs herein to be taxed by the Clerk.

Alfred A. Wheat, Justice.

Appeal noted by all defendants.

Alex. H. Bell, Jr., Assistant Corporation Counsel, Attorney for Defendants. Alfred A. Wheat, Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS—Filed April 12, 1930

* * * * * * *

Now come the defendants, by their counsel, and assign for error:

1. The action of the Court in granting a decree for the plaintiffs.

[fol. 14] 2. The action of the Court in holding that the Commissioners can not locate the Engine House upon property belonging to the United States.

3. The action of the Court in holding that the defendants were without authority to locate the Engine House upon the site designated by Congress.

4. The action of the Court in enjoining the defendants from erecting an Engine House at the northwest corner of Sixteenth Street and Colorado Avenue; as described in the amended bill.

William W. Bride, F. H. Stephens, Attorneys for Defendants.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD—Filed March 19, 1930

* * * * * * *

Now come Proctor L. Dougherty, Sidney F. Taliaferro and William B. Ladue, Commissioners of the District of Columbia, and appellants in the above entitled cause and designate the parts of the record which they desire to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. Amended bill for injunction.
2. Answer to amended bill for injunction.
3. Stipulation.
4. Final decree granting injunction.

Together with a copy of this designation.

March 19, 1930.

William W. Bride, Corporation Counsel, D. C.: Alex. H. Bell, Jr., Assistant Corporation Counsel, D. C., Attorneys for Appellants.

Service of the above this day acknowledged.

Henry I. Quinn, Geo. E. Sullivan, by H. I. Q., Attorneys for Appellees.

[fol. 15] Clerk's certificate to foregoing transcript omitted in printing.

Friday, November 6th, A. D. 1931.

*   *   *   *   *   *   *

No. 5230

Luther H. Reichelderfer, Herbert B. Crosby, and John C. Gotwals, Commissioners of the District of Columbia, Appellants,

v.

Henry I. Quinn, George J. Mueller, Jr., Henry Orth, Jr., et al.

The above entitled cause was submitted to the consideration of the Court on the printed record and briefs filed herein by Messrs. William W. Bride and Robert E. Lynch, attorneys for the appellants, and by Messrs. Henry I. Quinn and George E. Sullivan, attorneys for the appellees.

(Mr. Justice Van Orsdel did not sit in this case.)

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5230

Luther H. Reichelderfer, Herbert B. Crosby, and John C. Gotwals, Commissioners of the District of Columbia, Appellants,

v.

Henry I. Quinn, George J. Mueller, Jr., Henry Orth, Jr., et al., Appellees

Appeal from the Supreme Court of the District of Columbia

Submitted November 6, 1931. Decided Dec. 7, 1931

William W. Bride and Robert E. Lynch, of Washington, D. C., attorneys for appellants.

Henry I. Quinn and George E. Sullivan, of Washington, D. C., attorneys for appellees.

(Before Martin, Chief Justice, and Robb, Hitz, and Groner, Associate Justices)

Per Curiam:

It is agreed by counsel that the issue presented in this appeal and also the parties involved are identical with those appearing in Quinn et al. v. Dougherty et al., Commissioners of the District of Columbia, decided by this court January 7, 1929, 58 App. D. C. 339. It is only necessary now to say that, consistently with our decision in the former case, we affirm the decree of the lower court herein appealed from.

Affirmed.

A true copy. Test:

—— ——, Clerk, Court of Appeals, D. C.

Monday, December 7th, A. D. 1931.

* * * * * * *

October Term, 1931

No. 5230

Luther H. Reichelderfer, Herbert B. Crosby, and John C. Gotwals, Commissioners of the District of Columbia, Appellants,

v.

Henry I. Quinn, George J. Mueller, Jr., Henry Orth, Jr., et al.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Curiam, December 7, 1931.

(Mr. Justice Van Orsdel took no part in the consideration or decision of this case.)

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5230

LUTHER H. REICHELDERFER, HERBERT B. CROSBY, and JOHN C. GOTWALS, Commissioners of the District of Columbia, Appellants,

v.

HENRY I. QUINN et al.

DESIGNATION OF RECORD

The Clerk of the Court of Appeals will please include the following on petition for Writ of Certiorari to the Supreme Court of the United States in the Designation of Record in this case:

(1) The printed record in the Court of Appeals.
(2) Argument of cause.
(3) Opinion of the Court.
(4) Judgment.
(5) This designation of record.

William W. Bride, Corporation Counsel, D. C.; Vernon E. West, Principal Assistant Corporation Counsel; Robert E. Lynch, Assistant Corporation Counsel, Attorneys for Appellants.

Service of a copy of the above Designation of Record acknowledged this 11 day of December, 1931.

Henry I. Quinn, Geo. E. Sullivan, Attorneys for Appellees.

Endorsed: No. 5230. Luther H. Reichelderfer, Herbert B. Crosby, John C. Gotwals, Commissioners of the District of Columbia, Appellants, v. Henry I. Quinn, et al. Designation of Record. Court of Appeals, District of Columbia. Filed December 11, 1931. Henry W. Hodges, Clerk.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 19, inclusive, constitute a true copy of the transcript of record and proceedings of the said Court of Appeals as designated by counsel in the case of Luther H. Reichelderfer, Herbert B. Crosby and John C. Gotwals, Commissioners of the District of Columbia, Appellants, vs. Henry I. Quinn, George J. Mueller, Jr., Henry Orth, Jr., et al., No. 5230, October Term, 1931, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 12th day of December, A. D. 1931.

Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. (Seal Court of Appeals, District of Columbia.)

(1690)

[fol. 21] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 11, 1932

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,543. District of Columbia Court of Appeals. Term No. 9. Luther H. Reichelderfer, Herbert B. Crosby, and John C. Gotwals, Commissioners of the District of Columbia, petitioners, vs. Henry I. Quinn, George J. Mueller, Jr., Henry Orth, Jr., et al. Petition for a writ of certiorari and exhibit thereto. Filed February 24, 1932. File No. 36,543.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. [redacted] 9

LUTHER H. REICHELDERFER, HERBERT B. CROSBY AND JOHN C. GOTWALS, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, *Petitioners*,

v.

HENRY I. QUINN, GEORGE J. MUELLER, JR., HENRY ORTH, Jr., et al.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

WILLIAM W. BRIDE,
Corporation Counsel, D. C.

VERNON E. WEST,
ROBERT E. LYNCH,
Of Counsel.

February, 1932.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No.______

LUTHER H. REICHELDERFER, HERBERT B. CROSBY AND JOHN C. GOTWALS, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, *Petitioners*,

v.

HENRY I. QUINN, GEORGE J. MUELLER, JR., HENRY ORTH, Jr., et al.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

Petition.

The Corporation Counsel, on behalf of the Commissioners of the District of Columbia, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia entered in the above-entitled cause on December 7th, 1931, sustaining the judgment of the Supreme Court of the District of Columbia.

Statement.

The Act of Congress of May 21, 1928, directed the Commissioners of the District of Columbia to sell property owned by it at the corner of 16th and Webster Streets, N. W., theretofore acquired for a fire engine house site and to pay the proceeds into the Treasury of the United States. Said Act of Congress further provided:

> "And the Commissioners are hereby authorized and *directed* to erect a fire engine house, with furniture and furnishings for a fire engine company, at the northwest corner of Sixteenth Street and Colorado Avenue, on property belonging to the United States, and there is hereby set aside for such purpose a plot of ground running north from the junction of Sixteenth Street and Colorado Avenue, as now publicly owned, one hundred (100) feet on Sixteenth Street, thence west at right angles to the street, one hundred and sixty feet (160), thence south at right angles to the line of Colorado Avenue. The balance of the appropriations carried in the Acts of May 10, 1926, and March 2, 1927, for an engine house in the vicinity of Sixteenth Street and Piney Branch Road Northwest, is made available for the purpose aforesaid."

Prior to the commencement of the construction of the aforesaid fire engine house the respondents filed a bill in equity in the Supreme Court of the District of Columbia praying that the District Commissioners be restrained from proceeding with the erection of the said fire engine house. (R. 1). The bill of complaint alleges that respondents owned property used as a residence in the vicinity of 16th Street and Colorado Avenue, the proposed location of the fire engine house, and that their property was in a residential district as defined by the Zoning Regulations of the District of Columbia. The northwest corner of 16th Street and Colorado Avenue is a part of Rock Creek Park, which was established by Act of Congress of February 27, 1890, which Act provided that the said park be "perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of Rock Creek Park." The bill also alleges that the respondents established their homes relying upon the Zoning Laws and Regulations and the Act of Congress establishing Rock Creek Park.

The petitioners filed an answer (R. 8) substantially admitting the allegations of fact contained in the bill of complaint. A stipulation was entered into by counsel of record (R. 12) admitting that the respondents' predecessor in title was a party to the condemnation proceedings with respect to a tract of land owned by her, a portion of which was taken for the said Rock Creek Park, and without admitting the materiality of the averments, did not question that respondents relied upon the Zoning Laws and Regulations and the Rock Creek Park Act in establishing their homes; and that the respondents would be subjected only to such noise as is incidental to the normal and usual conduct and operation of a fire engine house.

The court entered a final decree for a perpetual injunction restraining the Commissioners of the District of Columbia and their successors in office from erecting or causing to be erected a fire engine house at the northwest corner of 16th Street and Colorado Avenue. (R. 13). The Court of Appeals sustained the action of the Supreme Court of the District of Columbia.

Question Presented.

The sole question presented is whether or not Congress may establish a fire engine house on property owned by the United States and known as Rock Creek Park.

Specifications of Error to Be Urged.

The Court of Appeals erred:

(1) In holding the District of Columbia Commissioners were not entitled to establish a fire engine house as directed by the Act of Congress.

(2) In permanently enjoining the District of Columbia Commissioners from erecting the fire

engine house as directed by the mandate of Congress.

(3) In holding Congress was without power to change the use of any part of property owned by the United States.

Reasons for Granting the Writ.

The questions involved in this case are of substantial importance to the United States Government and the District of Columbia for the reason that large tracts of land used for park and other purposes owned by the United States Government are situated in the District of Columbia. The denial of the right to establish a fire engine house by the duly authorized authorities may seriously affect the protection of private property, as well as government buildings and parks.

The decision of the Court of Appeals restrains the power of Congress over the District of Columbia.

The right and power of Congress is forever denied to change the use, in whole or in part, of land owned by the United States. The right to adequately safeguard and protect Rock Creek Park by locating a fire engine house in any part of it is denied to Congress.

WILLIAM W. BRIDE,
Corporation Counsel, D. C.

February, 1932.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

There were two opinions by the Court of Appeals. The first reported in 58 App. D. C. 339; and the second in 60 W. L. R. 38.

Jurisdiction.

The final judgment of the Court of Appeals of the District of Columbia was entered on the 7th day of December, 1931. The jurisdiction of this Court to issue the writ applied for is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Statement.

A statement of the facts and of the errors relied on will be found in the petition.

Provisions of Constitution and of Statutes Involved.

Article 1, Section 8, Clause 17 of the United States Constitution provides:

> "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession

of particular states, and the acceptance of Congress, become the seat of government of the United States."

45 Stats. at Large, 667 provides:

"The Commissioners of the District of Columbia are hereby authorized and directed to sell the property at the corner of Sixteenth and Webster Streets, heretofore acquired for a fire engine house site at public or private sale at not less than the purchase price paid therefor by the District of Columbia and pay the proceeds thereof into the Treasury of the United States, to the credit of the District of Columbia; and the Commissioners are hereby authorized and directed to erect a fire engine house, with furniture and furnishings for a fire engine company, at the northwest corner of Sixteenth Street and Colorado Avenue, on property belonging to the United States, and there is hereby set aside for such purpose a plot of ground running north from the junction of Sixteenth Street and Colorado Avenue, as now publicly owned, one hundred (100) feet on Sixteenth Street, thence west at right angles to the street, one hundred and sixty feet (160), thence south at right angles to the line of Colorado Avenue. The balance of the appropriations carried in the Acts of May 10, 1926, and March 2, 1927, for an engine house in the vicinity of Sixteenth Street and Piney Branch Road Northwest, is made available for the purpose aforesaid."

41 Statutes at Large 500.—the Act creating the Zoning Commission.

(Set out in full in appendix).

ARGUMENT.

I.

Congress Was Authorized to Establish a Fire Engine House as an Agency of the Police Power.

The plenary power of Congress over the District of Columbia should not lightly be emasculated by the Courts. The wisdom and discretion of Congress in establishing the fire engine house on a small plot of ground located in Rock Creek Park contiguous to 16th Street, should not be subjected to review by the Courts of the District of Columbia as the necessity for its establishment at the strategic point was a matter for the legislative and not judicial branch of the Government. It may well be that the necessity for the location of the fire engine house at this point was to protect Rock Creek Park, which consists of over 1600 acres, particularly in view of the fire hazards which may exist in such a large tract of land, containing extensive wooded sections with the incidental brush, undergrowth and leaves. A fire commencing in any part of this large tract of land would naturally rapidly spread, not only endangering and destroying extensive portions of the Park but also subjecting surrounding private property to serious danger, if not loss.

This Court has frequently held that the police power of the sovereign is not susceptible of definition, for, as was held in the case of Mugler *vs.* Kansas, 123 U. S. 623, it is a continuing one, and a vested right may in the future, because of changed situation, the growth of population, or other causes, become a menace to the public health and welfare, and be required to yield to the public good. The Court, in speaking of its limitations, in the case of the District of Columbia *vs.* Brooke, 214 U. S. 138, said:

> "In the case at bar we are dealing with an exercise of the police power, one of the most essential powers, at times most insistent, and always one of the least limitable of the powers of government."

The police power may be retroactive in effect, and may work a severe hardship on individuals when properly invoked. One of the most striking illustrations of this is shown by the case of Hadacheck *vs.* Sebastian, 239 U. S. 394. The plaintiff owned a tract of land worth $800,000 for use in the manufacture of brick. He had been extracting clay and manufacturing brick on the premises for a number of years when a city ordinance prohibited the manufacture of brick within an area in which his land was situated. It was not profitable to remove the clay to another part of the city for the manufacture of brick and his land was reduced in value to $60,000. The Court at page 410, said:

> "It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. *A vested interest cannot be asserted against it because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress and if in its march private interests are in the way they must yield to the good of the community.*" (Italics ours).

See also:

Legal Tender case, 12 Wall. (U. S.) 472.
Reinman vs. Littlerock, 237 U. S. 171.

The power of the several states on this question was determined in Atlantic Coast Line *vs.* Goldsboro, 232 U. S. 548. The Court said:

> "For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; *and that all contract and property rights are held subject to its fair exercise.* Slaughter-House Cases, 16 Wall. 36, 62; Munn *v.* Illinois, 94 U. S. 113,

> 125; Beer Co. *v.* Massachusetts, 97 U. S. 25, 33; Mugler *v.* Kansas, 123 U. S. 623, 665; Crowley *v.* Christensen, 137 U. S. 86, 89; New York & R. R. Co. *v.* Bristol, 151 U. S. 556, 567; Texas &c, R. R. Co. *v.* Miller, 221 U. S. 408, 414, 415. And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law. Chicago, Burlington &c, R. *v.* Chicago, 166 U. S. 226, 255; New Orleans Gas Co. *v.* Commissioners, 197 U. S. 453, 462; C. B. & Q. Ry. *v.* Commissioners, 200 U. S. 561."

The same doctrine is enunciated in Chicago & Alton R. R. *vs.* Tranbarger, 238 U. S. 67.

If the foregoing can be said of the police power of a State, certainly there can be no question as to the exclusive jurisdiction of Congress to legislate over the District of Columbia, especially in the interest of fire protection for the safety and welfare of the public.

There is a presumption of validity in the enactment of the law by legislature. The good faith of Congress or the Commissioners has not been questioned. Thus in Munn *vs.* Illinois, 94 U. S. 113, at page 132, the Court said:

> "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was

> passed. For us the question is one of propriety, not of expediency. If no state of facts could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could we must presume it did. Of the propriety of legislative interference, within the scope of legislative power, the legislature is the exclusive judge."

Later (1909), in the case of Home Telephone Co. *vs.* Los Angeles, 211 U. S. 265, the Court said:

> "It is a well settled rule of constitutional exposition that if a statute may or may not be, according to the circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed."

See also:

Sullivan *vs.* City of Shreveport, (1919), 251 U. S. 171.

In the case of L'Hote *vs.* New Orleans, 177 U S. 587, the City of New Orleans fixed a certain area as the "Red Light District" and prohibited any prostitute dwelling elsewhere in the city. Thereafter, the city changed the boundaries of the district, excluding a part of the former district and including additional territory in another direction. Within the newly defined limits were located a reputable hotel, a residence, a church and a Sunday school house, owned by petitioners who alleged that their property was greatly depreciated or rendered wholly useless for the purposes for which it was built. The Court, in its opinion, (page 597) adopts the following from 1 Dillon Mun. Corp. 4th ed., Sec. 141:

> "Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively styled 'Police Laws or Regulations.' It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury it is either *damnum asbque injuria*, or, in the theory of the law,, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

The United States possesses full and unlimited jurisdiction both of a political and municipal nature over the District of Columbia. Shoemaker *vs.* U. S., 147 U. S. 300.

> "The Congress of the United States, being empowered by the Constitution 'to exercise exclusive legislation in all cases whatsoever' over the seat of the national government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise within the district

> all legislative powers that the legislature of a state might exercise within the state; and may vest and distribute the judicial authority in and among the courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States."
>
> Capital Traction Co. *vs.* Hof., 174 U. S. 5.

In legislating for the District of Columbia, Congress remains the legislature of the Union, and its acts are the acts of the United States. There is no division here between powers of state government and powers of general government; all these powers are alike vested in the federal government. Washington Aqueduct (1855) 7 Op. Atty. Gen. 115.

The supreme legislative body of the District of Columbia is Congress. The subordinate legislative powers of a municipal character which may be lodged in the city corporations or in the district corporation, do not make these bodies sovereign. Metropolitan R. Co. *vs.* D. C. 132 U. S. 9.

In Nectow *vs.* Cambridge, 277 U. S. 183, the Court said:

> "We quite agree with the opinion expressed below that a court should not set aside the determination of public officers in such a matter unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no sub-

> stantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.' "

A case directly in point is that of Cincinnati *vs.* Wegehoft, 119 Ohio 136; 162 N. E. 389 (June, 1928), wherein the Court of Appeals of Ohio held that the city of Cincinnati was well within its power in establishing a fire engine house at a particular point despite the provisions of the zoning regulations or the injury to private property. The decision of the six justices was unanimous in holding that the construction and operation of a fire engine house was not a nuisance, and said:

> "* * * The right, and the duty as well, to exercise good faith in the furtherance of good municipal government, cannot be enjoined by the Courts because there exists a possibility that such power may be abused by the duly elected or appointed representatives of the city. * * *
>
> "The charge is that it is not necessary for the city to operate the engine house at the particular point chosen by the city and it is averred that it would serve equally well the purposes of the city if it were located at any one of the several places designated by the defendant in error, and that, if so located it would do less damage to the property of the defendant in error, which is only another way of saying that the Court should substitute its judgment for that of the chosen representatives of the city in the matter of locating the city's municipal buildings."

II.

The Use of Rock Creek Park Was Not Diverted.

The Court of Appeals in its first opinion, 58 App. D. C. 339, devotes a large space to the discussion of the alleged diversion of Rock Creek Park for a different use than that originally contemplated. It is submitted the establishment of a fire engine house on the park property and occupying a lot 100 feet by 160 feet at the intersection of two streets is not a diversion of a public park consisting of over 1600 acres, particularly where the engine house is to be located at the intersection of two public streets. Instead of a diversion or change of use of Rock Creek Park, Congress was enacting legislation to protect and safeguard the park in order that it could be used and enjoyed by the entire public.

The Court of Appeals quoted from and placed great reliance upon the case of Douglas *vs.* Montgomery, 118 Ala. 509. That case, however, is not in point because it appears from the decision that a public park was completely and entirely turned over to a railroad company by the city council. There is no analogy in the Douglas case, supra, to the one at bar when we consider that the fire engine house was to occupy a lot 100 feet by 160 feet in a park of land comprised of over 1600 acres.

There is no justification in the Record for the statement contained in the opinion of the Court of Appeals that the fire engine house could have been established at a more strategic point two blocks distant from the present site, outside of the residential district, and with little or no property damage to any one.

The case of Cincinnati vs. White, 6 Pet. 438, 8 L. Ed. 452, cited by the Court of Appeals in its opinion, likewise is not in point for it appears from a careful examination of the case that the original owners of property had dedicated a portion of the same adjacent to the water front of the city of Cincinnati, as a common for the use and benefit of the town forever. Subsequently the legal title to the land became vested in the plaintiff who sought to recover the land so dedicated for public use. There again the use of the entire property was attempted to be diverted. The Court held there was an estoppel in pais which precluded plaintiff from recovering the land so dedicated. In the case at bar there was no allegation that the erection of a fire engine house would have destroyed or impeded the respondents' right to the use of the park. The United States owns Rock Creek Park by virtue of the action of Congress, yet the Court held that Congress was powerless to direct the Municipal authorities to establish a fire engine house in the said park.

III.

The Zoning Regulations of the District of Columbia Do Not Control.

The contention that respondents' property was located in a residential zone is not sufficient to prevent the establishment of a fire engine house and this is principally true because a residential zone may be of such a large size that the public safety and protection of both public and private property may necessitate and warrant the establishment of a fire engine house within the area.

There is no allegation in the bill of complaint that Rock Creek Park is located in a residential use district. It is submitted that the fact that respondents' property is in a residential district is not sufficient to warrant the granting of an injunction preventing the erection of a fire engine house either in the residential use district or on government property adjacent thereto.

The Zoning Regulations were made pursuant to the authority of Congress. Congress if it so desires can change or alter zoning laws or regulations. Any subsequent enactment carrying out this policy, it is submitted, is a valid exercise of the inherent power of Congress to legislate for the District of Columbia.

CONCLUSION.

The writ of certiorari should be granted.

Respectfully submitted,

WILLIAM W. BRIDE,
Corporation Counsel, D. C.

VERNON E. WEST,
ROBERT E. LYNCH,
Of Counsel.

February, 1932.

ZONING ACT.

(Act of March 1, 1920, 41 Stat. 500)

An act to regulate the height, area, and use of buildings in the District of Columbia and to create a Zoning Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to protect the public health, secure the public safety and to protect property in the District of Columbia there is hereby created a Zoning Commission, which shall consist of the Commissioners of the District of Columbia, the officer in charge of public buildings and grounds of the District of Columbia, and the Superintendent of the United States Capitol Building and Grounds, which said commission shall have all the powers and perform all the duties hereinafter specified and shall serve without additional compensation. Such employees of the government of the District of Columbia as may be necessary to carry out the purposes of this act shall be assigned to such duty by the Commissioners of the District of Columbia without additional compensation.

There is hereby authorized for the expenses of said commission, including the employment of expert services and all incidental and contingent expenses, a sum not to exceed $5,000, payable one-half out of any money in the United States Treasury not otherwise appropriated and the other half out of the revenues of the District of Columbia.

SEC. 2. That within six months after the passage of this act and after public notice and hearing as hereinafter provided, the said commission shall divide the District of Columbia into certain districts, to be known, respectively, as height, area, and use districts, and shall adopt regulations specifying the height and area of buildings thereafter to be erected or altered therein, and the purposes for which buildings and premises therein may be used: *Provided,* That such regulations may differ in the various districts: *Provided further,* That the permissible height of buildings in any district shall not exceed the maximum height of buildings now authorized upon any street in any part of that district by the act of Congress approved June 1, 1910, and amendments thereto, regulating the height of buildings in the District of Columbia: *And provided further,* That no such districts shall be established, nor shall any regulations therefor be adopted, nor shall the height, area, or use of buildings to be erected therein be prescribed until said commission has afforded persons interested an opportunity to be heard at a public hearing as hereinafter provided: *And provided further,* That in residence districts the usual accessories of a residence located on the same lot including the office of a physician, dentist, or other person, and including a private garage containing space for not more than four automobiles, shall not be prohibited.

SEC. 3. That wherever, under the provision of this act, it is required that a public hearing shall be held, notice of the time and place of such hearing shall be published for not less than ten consecutive days in one or more newspapers or general circulation printed and published in the District of Columbia; and such public hearing may be adjourned from time to time: *Provided,* That if the time and place of the adjourned meeting is publicly announced when the adjournment is had, no further notice of such adjourned meeting need be published.

SEC. 4. That after the public hearing herein provided for shall have been concluded, said commission shall definitely determine the number and boundaries of the district which it is hereby authorized and directed to establish, and shall specify the height and area of the buildings which may thereafter be erected therein, and shall prescribe the purposes for which such buildings thereafter erected may or may not be used. Said districts so established shall not be changed except on order of said commission after public hearing. Said commission may initiate any changes, or they may be initiated upon the petition of the owners affected. Where the proposed change is to add a contiguous area to a use, height, or area district, the owners of at least 50 per centum of the street frontage proposed to be changed must join in the petition: *Provided,* That if the frontage proposed to be changed is not a contiguous area, the owners of at least 50 per centum of a frontage within the area not less than three blocks in length must join in such petition before it may be considered by said commission. No such change shall be made, either by said commission on its own motion or upon such petition, except with the unanimous vote of said commission, if the owners of at least 20 per centum of the frontage proposed to be changed protest against such change.

SEC. 5. That said commission is authorized and empowered to make such orders and adopt such regulations not inconsistent with law as may be necessary to accomplish the purposes and carry into effect the provisions of this act: *Provided,* That no order or regulation so adopted shall require any change in the plans, construction or designated use of (a) a building for which a permit shall have been issued, or plans for which shall be on file with the inspector of buildings of the District of Columbia at the time the orders or regulations authorized under this act are promulgated; or (b) a permit for the erection of which shall be issued within thirty days after promulgation of the orders or regulations authorized or adopted under this act and the construction of which in either of the above cases shall have been diligently prosecuted within a year from the date of such permit and the ground story framework of which, including the second tier of beams, shall have been completed within said year, and which entire building shall be completed according to such plans within two years of the date of the promulgation of such orders or regulations; or (c) prevent the restoration of a building partially destroyed by fire, explosion, act of God or the public enemy or prevent the continuance of the use of such building or part thereof as such use existed at the time of such partial destruction, or prevent a change of such existing use except under limitations provided herein in relation to existing buildings and premises: *Provided further,* That no frame building that has been damaged by fire or otherwise more than one-half of its original value shall be restored within the fire limits as provided by the building regulations of the District of Columbia; or (d) prevent the restoration of a wall declared unsafe by the inspector of buildings of the District or by a board of survey appointed in accordance with an existing law or regulation.

SEC. 6. That any lawful use of a building or premises existing at the time of the adoption of orders and regulations made under the authority of this act may be continued, although such use does not conform with the provisions hereof or with the provisions of such orders and regulations; and such use may be extended throughout the building, provided no structural alterations, except those required by law or regulation, is made therein and no new building is erected. Where the boundary line of any use district divides a lot in a single ownership at the time of the adoption of orders and regulations under the authority of this act, the commission may permit a use authorized on either portion of such lot to extend to the entire lot, but not more than twenty-five feet beyond the boundary line of the use district.

SEC. 7. The maps of the districts established by said commission and copies of all orders and regulations as to the height and area of buildings to be erected therein and as to the uses to which such buildings may be lawfully devoted, and copies of all other official orders and regulations of the commission shall be filed in the office of the Engineer Commissioner of the District of Columbia. Copies of all orders and regulations shall be published in one or more newspapers printed in the District of Columbia for the information of all concerned.

SEC. 8. That it shall be unlawful to use or permit the use of any building or premises or part thereof hereafter created, erected, changed, or converted wholly or partly in its use or structure until a certificate of occupancy shall have been issued by authority of said zoning commission.

SEC. 9. That buildings erected, altered, or raised, or converted in violation of any of the provisions of this act or the orders and regulations made under the authority therof are hereby declared to be common nuisances; and the owner or person in charge of or maintaining any such buildings, upon conviction on information filed in the police court of the District of Columbia by the corporation counsel or any of his assistants in the name of said District, and which court is hereby authorized to hear and determine such cases, shall be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not more than $100 per day for each and every day such nuisance shall be permitted to continue and shall be required by said court to abate such nuisance. The corporation counsel of the District of Columbia may maintain an action in the Supreme Court of the District of Columbia in the name of the District of Columbia to abate and perpetually enjoin such nuisance.

SEC. 10. That the Commissioners of the District of Columbia shall enforce the provisions of this act and the orders and regulations adopted by said Zoning Commission under the authority thereof, and nothing herein contained shall be construed to limit the authority of the Commissioners of the District of Columbia to make municipal regulations as heretofore: *Provided*, That such regulations are not inconsistent with the provisions of this law and the orders and regulations made thereunder. In interpreting and applying the provisions of this act and of the orders and regulations made thereunder they shall be held to be the minimum requirements for the promotion of the public health, safety, comfort, convenience, and general welfare. This act shall not abrogate or annul any easements, covenants, or other agreements between parties: *Provided, however*, That as to all future building construction or use of premises where this act or any orders or regulations adopted under the authority thereof impose a greater restriction upon the use of buildings or premises or upon height of building, or require larger open spaces than are imposed or required by existing law, regulations, or permits, or by such easements, covenants, or agreements, the provisions of this act and of the orders and regulations made thereunder shall control.

SEC. 11. That all laws, or parts of laws and regulations in conflict with the provisions of this act are hereby repealed.

Approved March 1, 1920.

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CHARLES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 9

LUTHER H. REICHELDERFER, HERBERT B. CROSBY, and JOHN C. GOTWALS, Commissioners of the District of Columbia,
Petitioners,

vs.

HENRY I. QUINN, GEORGE J. MUELLER, JR., HENRY ORTH, JR., et al.

On Writ of Certiorari to the Court of Appeals of The District of Columbia

BRIEF FOR THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA

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BRIEF FOR THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA

OPINIONS BELOW

There were two opinions rendered by the Court of Appeals, the first reported in 58 App. D. C. 339 and the second in 60 App. D. C. 325. (R. 16.)

JURISDICTION

The judgment of the Court of Appeals was entered on December 7, 1931. The petition for certiorari was filed on February 24, 1932, and was granted on April 11, 1932. Jurisdiction to issue the writ is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether Congress may establish a fire engine house in the District of Columbia on property owned by the United States and known as Rock Creek Park.

PROVISIONS OF CONSTITUTION AND OF STATUTES INVOLVED

Article 1, Section 8, Clause 17 of the United States Constitution provides:

> "The Congress shall have power—"
> "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of government of the United States."

45 Stats. at Large, 667 provides:

"The Commissioners of the District of Columbia are hereby authorized and directed to sell the property at the corner of Sixteenth and Webster Streets, heretofore acquired for a fire engine house site at public or private sale at not less than the purchase price paid therefor by the District of Columbia and pay the proceeds thereof into the Treasury of the United States, to the credit of the District of Columbia; and the Commissioners are hereby authorized and directed to erect a fire engine house, with furniture and furnishings for a fire engine company, at the northwest corner of Sixteenth Street and Colorado Avenue, on property belonging to the United States, and there is hereby set aside for such purpose a plot of ground running north from the junction of Sixteenth Street and Colorado Avenue, as now publicly owned, one hundred (100) feet on Sixteenth Street, thence west at right angles to the street, one hundred and sixty feet (160), thence south at right angles to the line of Colorado Avenue. The balance of the appropriations carried in the Acts of May 10, 1926, and March 2, 1927, for an engine house in the vicinity of Sixteenth Street and Piney Branch Road Northwest, is made available for the purpose aforesaid."

41 Statutes at Large 500.—the Act creating the Zoning Commission.
(Set out in full in appendix.)

26 Statutes at Large 492—the Act establishing Rock Creek Park.
(Set out in full in appendix.)

STATEMENT OF FACTS

Congress by its act of May 21, 1928 (45 Stats. at L. 667), directed the Commissioners of the District of Columbia to erect a fire engine house on the northwest corner of 16th Street and Colorado Avenue on property owned by the United States, and to sell certain property theretofore acquired for that purpose. The pertinent part of the said Act provides:

> "And the Commissioners are hereby authorized and *directed* to erect a fire engine house, with furniture and furnishings for a fire engine company, at the northwest corner of Sixteenth Street and Colorado Avenue, on property belonging to the United States, and there is hereby set aside for such purpose a plot of ground running north from the junction of Sixteenth Street and Colorado Avenue, as now publicly owned, one hundred (100) feet on Sixteenth Street, thence west at right angles to the street, one hundred and sixty feet (160), thence south at right angles to the line of Colorado Avenue. The balance of the appropriations carried in the Acts of May 10, 1926, and March 2, 1927, for an engine house in the vicinity of Sixteenth Street and Piney Branch Road Northwest, is made available for the purpose aforesaid."

Prior to the commencement of the construction of the aforesaid fire engine house the respondents filed a bill in equity in the Supreme Court of the District of Columbia praying that the District

Commissioners be restrained from proceeding with the erection of the said fire engine house. (R. 1.) The bill of complaint alleges that respondents owned property used as a residence in the vicinity of 16th Street and Colorado Avenue, the proposed location of the fire engine house, and that their property was in a residential district as defined by the Zoning Regulations of the District of Columbia. The northwest corner of 16th Street and Colorado Avenue is a part of Rock Creek Park, which was established by Act of Congress of September 27, 1890, which Act provided that the said park be "perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of Rock Creek Park." The bill also alleges that the respondents established their homes relying upon the Zoning Laws and Regulations and the Act of Congress establishing Rock Creek Park.

The petitioners filed an answer (R. 8) substantially admitting the allegations of fact contained in the bill of complaint. A stipulation was entered into by counsel of record (R. 12) admitting that the respondents' predecessor in title was a party to the condemnation proceedings with respect to a tract of land owned by her, a portion of which was taken for the said Rock Creek Park, and without admitting the materiality of the averments, did not question that respondents relied upon the Zoning Laws and Regulations and the Rock Creek Park Act in establishing their homes;

and that the respondents would be subjected only to such noise as is incidental to the normal and usual conduct and operation of a fire engine house.

The court entered a final decree for a perpetual injunction restraining the Commissioners of the District of Columbia and their successors in office from erecting or causing to be erected a fire engine house at the northwest corner of 16th Street and Colorado Avenue. (R. 13.) The Court of Appeals sustained the action of the Supreme Court of the District of Columbia.

SPECIFICATIONS OF ERROR TO BE URGED

The Court of Appeals erred:

(1) In holding the District of Columbia Commissioners were not entitled to establish a fire engine house as directed by the Act of Congress.

(2) In permanently enjoining the District of Columbia Commissioners from erecting the fire engine house as directed by the mandate of Congress.

(3) In holding Congress was without power to change the use of any part of property owned by the United States.

SUMMARY OF ARGUMENT

Congress was authorized to establish a fire engine house as an agency of the police power.

The use of Rock Creek Park was not diverted.

The Zoning Regulations of the District of Columbia do not control.

Respondents' remedy, if any, was at law.

ARGUMENT

I.

Congress Was Authorized to Establish a Fire Engine House as an Agency of the Police Power.

Congress was given the power to exercise *exclusive* legislation in all cases whatsoever over the District of Columbia. Exercising this right Congress directed the Commissioners of the District of Columbia to establish a fire engine house at the intersection of two streets in the District of Columbia, to wit, 16th Street and Colorado Avenue. The Court of Appeals held that the Congress which was authorized by the Constitution to exercise exclusive legislation over the District of Columbia could not establish a fire engine house on property owned by the United States government.

The plenary power of Congress over the District of Columbia should not lightly be emasculated by the Courts. The wisdom and discretion of Congress in establishing the fire engine house on a small plot of ground located in Rock Creek Park contiguous to 16th Street, should not be subjected to review by the Courts of the District of

Columbia as the necessity for its establishment at the strategic point was a matter for the legislative and not the judicial branch of the Government. It may well be that the necessity for the location of the fire engine house at this point was to protect Rock Creek Park, which consists of over 1600 acres, particularly in view of the fire hazards which may exist in such a large tract of land, containing extensive wooded sections with the incidental brush, undergrowth and leaves. A fire commencing in any part of this large tract of land would naturally spread rapidly, not only endangering and destroying large portions of the Park but also subjecting adjacent private property to serious damage, if not total loss.

The Act of Congress authorizing the establishment of Rock Creek Park, in Section 7 thereof, placed the joint control of the Park in the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army. Said Section 7 further states:

> "* * * whose duty it shall also be to make and publish such regulations as they deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury or spoliation of all timber, animals, or curiosities within said park, and their retention in their natural condition, as nearly as possible."

This Court has frequently held that the police power of the sovereign is not susceptible of definition, for, as was held in the case of Mugler *vs.* Kansas, 123 U. S. 623, it is a continuing one, and a vested right may in the future, because of a changed situation, the growth of population, or other causes, become a menace to the public health and welfare, and be required to yield to the public good. The Court, in speaking of its limitations, in the case of the District of Columbia *vs.* Brooke, 214 U. S. 138, said:

> "In the case at bar we are dealing with an exercise of the police power, one of the most essential powers, at times most insistent, and always one of the least limitable of the powers of government."

The police power may be retroactive in effect, and may work a severe hardship on individuals when properly invoked. One of the most striking illustrations of this is shown by the case of Hadacheck *vs.* Sebastian, 239 U. S. 394. The plaintiff owned a tract of land worth $800,000 for use in the manufacture of brick. He had been extracting clay and manufacturing brick on the premises for a number of years when a city ordinance prohibited the manufacture of brick within an area in which his land was situated. It was not profitable to remove the clay to another part of the city for the manufacture of brick and his land was reduced in value to $60,000. The Court at page 410, said:

> "It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. *A vested interest cannot be asserted against it because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress and if in its march private interests are in the way they must yield to the good of the community.*" (Italics ours.)

See also:

> Legal Tender case, 12 Wall. (U. S.) 472.
> Reinman vs. Littlerock, 237 U. S. 171.

The power of the several states on this question was determined in Atlantic Coast Line *vs.* Goldsboro, 232 U. S. 548. The Court said:

> "For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; *and that all contract and property rights are held subject to its fair exercise.* Slaughter-House Cases, 16 Wall. 36, 62; Munn *v.* Illinois, 94 U. S. 113,

> 125; Beer Co. *v.* Massachusetts, 97 U. S. 25, 33; Mugler *v.* Kansas, 123 U. S. 623, 665; Crowley *v.* Christensen, 137 U. S. 86, 89; New York & R. R. Co. *v.* Bristol, 151 U. S. 556, 567; Texas &c, R. R. Co. *v.* Miller, 221 U. S. 408, 414, 415. And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law. Chicago, Burlington &c, R. *v.* Chicago, 166 U. S. 226, 255; New Orleans Gas Co. *v.* Commissioners, 197 U. S. 453, 462; C. B. & Q. Ry. *v.* Commissioners, 200 U. S. 561."

The same doctrine is enunciated in Chicago & Alton R. R. *vs.* Tranbarger, 238 U. S. 67.

If the foregoing can be said of the police power of a State, certainly there can be no question as to the exclusive jurisdiction of Congress to legislate over the District of Columbia, especially in the interest of fire protection for the safety and welfare of the public.

There is a presumption of validity in the enactment of the law by legislature. The good faith of Congress or the Commissioners has not been questioned. Thus in Munn *vs.* Illinois, 94 U. S. 113, at page 132, the Court said:

> "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of pro-

> priety, not of expediency. If no state of facts could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could we must presume it did. *Of the propriety of legislative interference, within the scope of legislative power, the legislature is the exclusive judge.*"

Later (1909), in the case of Home Telephone Co. *vs.* Los Angeles, 211 U. S. 265, the Court said:

> "It is a well settled rule of constitutional exposition that if a statute may or may not be, according to the circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed."

See also:

> Sullivan *vs.* City of Shreveport, (1919), 251 U. S. 171.

In the case of L'Hote *vs.* New Orleans, 177 U. S. 587, the City of New Orleans fixed a certain area as the "Red Light District" and prohibited any prostitute dwelling elsewhere in the city. Thereafter, the city changed the boundaries of the district, excluding a part of the former district and including additional territory in another direction. Within the newly defined limits were located a reputable hotel, a residence, a church and a Sunday school house, owned by petitioners who alleged that their property was greatly depreciated or rendered wholly useless for the purposes for which it was built. The Court, in its opinion, (page 597) adopts the following from 1 Dillon Mun. Corp. 4th ed., Sec. 141:

> "Laws and ordinances relating to the comfort, health, convenience, good order, and general welfare of the inhabitants are comprehensively styled 'Police Laws or Regulations.' It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffers injury it is either *damnum asbque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

The United States possesses full and unlimited jurisdiction both of a political and municipal nature over the District of Columbia. Shoemaker *vs.* U. S., 147 U. S. 300.

> "The Congress of the United States, being empowered by the Constitution 'to exercise exclusive legislation in all cases whatsoever' over the seat of the national government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise within the district all legislative powers that the legislature of

> a state might exercise within the state; and may vest and distribute the judicial authority in and among the courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States."

In legislating for the District of Columbia, Congress remains the legislature of the Union, and its acts are the acts of the United States. There is no division here between powers of state government and powers of general government; all these powers are alike vested in the federal government. Washington Aqueduct (1855) 7 Op. Atty. Gen. 115.

The supreme legislative body of the District of Columbia is Congress. The subordinate legislative powers of a municipal character which may be lodged in the city corporations or in the district corporation, do not make these bodies sovereign. Metropolitan R. Co. *vs.* D. C. 132 U. S. 9.

In Nectow *vs.* Cambridge, 277 U. S. 183, the Court said:

> "We quite agree with the opinion expressed below that a court should not set aside the determination of public officers in such a matter unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the pub-

> lic morals, the public safety or the public welfare in its proper sense.' "

A case directly in point is that of Cincinnati *vs.* Wegehoft, 119 Ohio 136; 162 N. E. 389 (June, 1928), wherein the Court of Appeals of Ohio held that the city of Cincinnati was well within its power in establishing a fire engine house at a particular point despite the provisions of the zoning regulations or the injury to private property. The decision of the six justices was unanimous in holding that the construction and operation of a fire engine house was not a nuisance, and said:

> "* * * The right, and the duty as well, to exercise good faith in the furtherance of good municipal government, cannot be enjoined by the Courts because there exists a possibility that such power may be abused by the duly elected or appointed representatives of the city. * * *
>
> "The charge is that it is not necessary for the city to operate the engine house at the particular point chosen by the city and it is averred that it would serve equally well the purposes of the city if it were located at any one of the several places designated by the defendant in error, and that, if so located it would do less damage to the property of the defendant in error, which is only another way of saying that the Court should substitute its judgment for that of the chosen representatives of the city in the matter of locating the city's municipal buildings."

Nowhere is it alleged in the bill of complaint or the stipulation that public property embraced within Rock Creek Park or private property adjacent thereto has adequate fire protection.

The Court of Appeals, in its first decision, 58 App. D. C. 339, at page 340, said:

> "We deem it of no importance whether or not the mere location and erection of a fire engine house is, strictly speaking, the exercise of police power. While it furnishes headquarters and housing for the men and equipment used in the public fire service, to protect the safety and property of the public at large, it is not such an agency that the protection and safety afforded is dependent upon its location at any particular given point."

There is no allegation in the bill of complaint or anywhere in the record that the protection and safety afforded by the existence of a fire engine house is not dependent upon its location at any particular given point. Does not common experience, as well as common sense, tell us that fire protection is only adequate when fire apparatus properly equipped and manned can, within a few minutes, be at the place where a fire has started? Time is of the essence—a distance of three city blocks or a delay of three minutes may result in many thousand dollars of damage, as well as personal injury or death. Where is there any basis for the assumption by the Court of Appeals that the engine house in question could be located outside of the particular residential district and furnish the same public protection?

The Court of Appeals also stated at page 340:

> "* * * It appears in this case that the engine house could have been established at a more strategic point two blocks distant from the present site, where it would have been outside of a residential district and with little or no property damage to any one."

It is submitted that nowhere does the record justify such a statement. As a matter of fact, it appears from the record in this case that the property of the respondent Quinn is located at 1507 Gallatin Street, which is substantially as near 14th Street as it is near 16th Street. The main point, however, is that it is for Congress to say where it desires to locate a fire engine house without the supervision or review from the Courts. Certainly Congress through its committees is better able and better equipped to properly judge how the lives and property of the citizens of the District of Columbia should be protected.

II.

The Use of Rock Creek Park Was Not Diverted.

The Court of Appeals in its first opinion, 58 App. D. C. 339, devotes a large space to the discussion of the alleged diversion of Rock Creek Park for a different use than that originally contemplated. It is submitted the establishment of a fire engine house on the park property and occupying a lot 100 feet by 160 feet at the intersection of two streets is not a diversion of a public park consisting of over 1600 acres, particularly where the engine house is to be located at the intersection of two public streets. Instead of a diversion or change of use of Rock Creek Park, Congress was enacting legislation to protect and safeguard the park in order that it could be used and enjoyed by the entire public.

The Court of Appeals quoted from and placed great reliance upon the case of Douglas *vs.* Montgomery, 118 Ala. 599. That case, however, is not in point because it appears from the decision that a public park was completely and entirely turned over to a railroad company by the city council. There is no analogy in the Douglas case, supra, to the one at bar when we consider that the fire engine house was to occupy a lot 100 feet by 160 feet in a park of land comprised of over 1600 acres.

The case of Cincinnati *vs.* White, 6 Pet. 438, 8 L. Ed. 452, cited by the Court of Appeals in its opinion, likewise is not in point for it appears from a careful examination of the case that the original owners of property had dedicated a portion of the same adjacent to the water front of the city of Cincinnati, as a common for the use and benefit of the town forever. Subsequently the legal title to the land became vested in the plaintiff who sought to recover the land so dedicated for public use. There again the use of the entire property was attempted to be diverted. The Court held there was an estoppel in pais which precluded plaintiff from recovering the land so dedicated. The United States owns Rock Creek Park by virtue of the action of Congress, yet the Court held that Congress was powerless to direct the Municipal authorities to establish a fire engine house in the said park.

Nowhere in the bill of complaint or the stipulation is it stated that the proposed fire engine house obstructs, obscures or interferes with the view of the park from any of the homes of the respondents, nor is it even stated in the bill of complaint or the stipulation that any one of the respondents' homes is so located that it has an unobstructed view of the park, and that the placement of the fire engine house would disturb or obstruct such view.

There is no allegation or proof that the placement of a fire engine house at the point designated would impede the use of any of the respondents to Rock Creek Park.

III.

The Zoning Regulations of the District of Columbia Do Not Control.

There is no allegation in the bill of complaint that the proposed site of the fire engine house is located in a residential use district. The respondents were careful to state that their property was located in a residential use district but did not say directly or indirectly that the corner of 16th

Street and Colorado Avenue, composing a part of Rock Creek Park, was in a residential use district.

The contention that respondents' property was located in a residential zone is not sufficient to prevent the establishment of a fire engine house and this is principally true because a residential zone may be of such a large size that the public safety and protection of both public and private property may necessitate and warrant the establishment of a fire engine house within the area.

The Zoning Regulations were made pursuant to the authority of Congress. Congress if it so desires can change or alter zoning laws or regulations. Any subsequent enactment carrying out this policy, it is submitted, is a valid exercise of the inherent power of Congress to legislate for the District of Columbia.

IV.

Respondents' Remedy, If Any, Was At Law.

The claim of respondents that their only remedy was by the issuance of an injunction is untenable. It is submitted that they have no remedy at all because the Act of Congress was lawful and there was no legal damage resulting from the establishment of the fire engine house as contemplated. If, however, the Court should come to the conclusion that by reason of the condemnation proceedings which were instituted at the time of the establishment of Rock Creek Park (1890) the respondents, the present owners, are entitled to compensation, then their remedy is not by an injunction in an equity court, but is one at law. This Court in Hurley, Secretary of War, *vs.* Kincaid, 285 U. S. 95, decided February 23, 1932, dismissed a bill for an injunction brought by Kincaid against the Secretary of War and others for an alleged taking of land and held that Kincaid's remedy, if any, was at law.

It is well to note here that the Court of Appeals in its opinion states that the respondents were entitled to "an unobstructed view into the park." The record distinctly fails to disclose that any of the respondents had an unobstructed view into the Park, or any view whatever of the Park. In fact the contrary may be definitely inferred from the addresses given of the various respondents, which indicate that several of them are substantially one city block or more from the entrance of the Park.

Courts will not inquire into the motives which induce members of Congress to enact certain legislation. Arizona *vs.* California, 283 U. S. 455.

Injunctions cannot be maintained to prevent assumed potential invasions. Arizona *vs.* California, 283 U. S. 455.

CONCLUSION

It is submitted that the decision of the Court of Appeals of the District of Columbia should be reversed.

Respectfully submitted:

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September 1932.

ZONING ACT.

(Act of March 1, 1920, 41 Stat. 500.)

An act to regulate the height, area, and use of buildings in the District of Columbia and to create a Zoning Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to protect the public health, secure the public safety and to protect property in the District of Columbia there is hereby created a Zoning Commission, which shall consist of the Commissioners of the District of Columbia, the officer in charge of public buildings and grounds of the District of Columbia, and the Superintendent of the United States Capitol Building and Grounds, which said commission shall have all the powers and perform all the duties hereinafter specified and shall serve without additional compensation. Such employees of the government of the District of Columbia as may be necessary to carry out the purposes of this act shall be assigned to such duty by the Commissioners of the District of Columbia without additional compensation.

There is hereby authorized for the expenses of said commission, including the employment of expert services and all incidental and contingent expenses, a sum not to exceed $5,000, payable one-half out of any money in the United States Treasury not otherwise appropriated and the other half out of the revenues of the District of Columbia.

SEC. 2. That within six months after the passage of this act and after public notice and hearing as hereinafter provided, the said commission shall divide the District of Columbia into certain districts, to be known, respectively, as height, area, and use districts, and shall adopt regulations specifying the height and area of buildings thereafter to be erected or altered therein, and the purposes for which buildings and premises therein may be used: *Provided*, That such regulations may differ in the various districts: *Provided further*, That the permissible height of buildings in any district shall not exceed the maximum height of buildings now authorized upon any street in any part of that district by the act of Congress approved June 1, 1910, and amendments thereto, regulating the height of buildings in the District of Columbia: *And provided further*, That no such districts shall be established, nor shall any regulations therefor be adopted, nor shall the height, area, or use of buildings to be erected therein be prescribed until said commission has afforded persons interested an opportunity to be heard at a public hearing as hereinafter provided: *And provided further*, That in residence districts the usual accessories of a residence located on the same lot including the office of a physician, dentist, or other person, and including a private garage containing space for not more than four automobiles, shall not be prohibited.

SEC. 3. That wherever, under the provision of this act, it is required that a public hearing shall be held, notice of the time and place of such hearing shall be published for not less than ten consecutive days in one or more newspapers of general circulation printed and published in the District of Columbia; and such public hearing may be adjourned from time to time: *Provided*, That if the time and place of the adjourned meeting is publicly announced when the adjournment is had, no further notice of such adjourned meeting need be published.

SEC. 4. That after the public hearing herein provided for shall have been concluded, said commission shall definitely determine the number and boundaries of the district which it is hereby authorized and directed to establish, and shall specify the height and area of the buildings which may thereafter be erected therein, and shall prescribe the purposes for which such buildings thereafter erected may or may not be used. Said districts so established shall not be changed except on order of said commission after public hearing. Said commission may initiate any changes, or they may be initiated upon the petition of the owners affected. Where the proposed change is to add a contiguous area to a use, height, or area district, the owners of at least 50 per centum of the street frontage proposed to be changed must join in the petition: *Provided*, That if the frontage proposed to be changed is not a contiguous area, the owners of at least 50 per centum of a frontage within the area not less than three blocks in length must join in such petition before it may be considered by said commission. No such change shall be made, either by said commission on its own motion or upon such petition, except with the unanimous vote of said commission, if the owners of at least 20 per centum of the frontage proposed to be changed protest against such change.

SEC. 5. That said commission is authorized and empowered to make such orders and adopt such regulations not inconsistent with law as may be necessary to accomplish the purposes and carry into effect the provisions of this act: *Provided*, That no order or regulation so adopted shall require any change in the plans, construction or designated use of (a) a building for which a permit shall have been issued, or plans for which shall be on file with the inspector of buildings of the

District of Columbia at the time the orders or regulations authorized under this act are promulgated; or (b) a permit for the erection of which shall be issued within thirty days after promulgation of the orders or regulations authorized or adopted under this act and the construction of which in either of the above cases shall have been diligently prosecuted within a year from the date of such permit and the ground story framework of which, including the second tier of beams, shall have been completed within said year, and which entire building shall be completed according to such plans within two years of the date of the promulgation of such orders or regulations; or (c) prevent the restoration of a building partially destroyed by fire, explosion, act of God or the public enemy or prevent the continuance of the use of such building or part thereof as such use existed at the time of such partial destruction, or prevent a change of such existing use except under limitations provided herein in relation to existing buildings and premises: *Provided further*, That no frame building that has been damaged by fire or otherwise more than one-half of its original value shall be restored within the fire limits as provided by the building regulations of the District of Columbia; or (d) prevent the restoration of a wall declared unsafe by the inspector of buildings of the District or by a board of survey appointed in accordance with an existing law or regulation.

SEC. 6. That any lawful use of a building or premises existing at the time of the adoption of orders and regulations made under the authority of this act may be continued, although such use does not conform with the provisions hereof or with the provisions of such orders and regulations; and such use may be extended throughout the building, provided no structural alterations, except those required by law or regulation, is made therein and no new building is erected. Where the boundary line of any use district divides a lot in a single ownership at the time of the adoption of orders and regulations under the authority of this act, the commission may permit a use authorized on either portion of such lot to extend to the entire lot, but not more than twenty-five feet beyond the boundary line of the use district.

SEC. 7. The maps of the districts established by said commission and copies of all orders and regulations as to the height and area of buildings to be erected therein and as to the uses to which such buildings may be lawfully devoted, and copies of all other official orders and regulations of the commission shall be filed in the office of the Engineer Commissioner of the District of Columbia. Copies of all orders and regulations shall be published in one or more newspapers printed in the District of Columbia for the information of all concerned.

SEC. 8. That it shall be unlawful to use or permit the use of any building or premises or part thereof hereafter created, erected, changed, or converted wholly or partly in its use or structure until a certificate of occupancy shall have been issued by authority of said zoning commission.

SEC. 9. That buildings erected, altered, or raised, or converted in violation of any of the provisions of this act or the orders and regulations made under the authority thereof are hereby declared to be common nuisances; and the owner or person in charge of or maintaining any such buildings, upon conviction on information filed in the police court of the District of Columbia by the corporation counsel or any of his assistants in the name of said District, and which court is hereby authorized to hear and determine such cases, shall be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not more than $100 per day for each and every day such nuisance shall be permitted to continue and shall be required by said court to abate such nuisance. The corporation counsel of the District of Columbia may maintain an action in the Supreme Court of the District of Columbia in the name of the District of Columbia to abate and perpetually enjoin such nuisance.

SEC. 10. That the Commissioners of the District of Columbia shall enforce the provisions of this act and the orders and regulations adopted by said Zoning Commission under the authority thereof, and nothing herein contained shall be construed to limit the authority of the Commissioners of the District of Columbia to make municipal regulations as heretofore: *Provided,* That such regulations are not inconsistent with the provisions of this law and the orders and regulations made thereunder. In interpreting and applying the provisions of this act and of the orders and regulations made thereunder they shall be held to be the minimum requirements for the promotion of the public health, safety, comfort, convenience, and general welfare. This act shall not abrogate or annul any easements, covenants, or other agreements between parties: *Provided, however,* That as to all future building construction or use of premises where this act or any orders or regulations adopted under the authority thereof impose a greater restriction upon the use of buildings or premises or upon height of building, or require larger open spaces than are imposed or required by existing law, regulations, or permits, or by such easements, covenants, or agreements, the provisions of this act and of the orders and regulations made thereunder shall control.

SEC. 11. That all laws, or parts of laws and regulations in conflict with the provisions of this act are hereby repealed.

Approved March 1, 1920.

[PUBLIC—No. 297.]

An act authorizing the establishing of a public park in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a tract of land lying on both sides of Rock Creek, beginning at Klingle Ford Bridge, and running northwardly, following the course of said creek, of a width not less at any point than six hundred feet, nor more than twelve hundred feet, including the bed of the creek, of which not less than two hundred feet shall be on either side of said creek, south of Broad Branch road and Blagden Mill road and of such greater width north of said roads as the commissioners designated in this act may select, shall be secured, as hereinafter set out, and be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of Rock Creek Park: *Provided, however,* That the whole tract so to be selected and condemned under the provisions of this act shall not exceed two thousand acres nor the total cost thereof exceed the amount of money herein appropriated.

SEC. 2. That the Chief of Engineers of the United States Army, the Engineer Commissioner of the District of Columbia, and three citizens to be appointed by the President, by and with the advice and consent of the Senate, be, and they are hereby, created a commission to select the land for said park, of the quantity and within the limits aforesaid, and to have the same surveyed by the assistant to the said Engineer Commissioner of the District of Columbia in charge of public highways, which said assistant shall also act as executive officer to the said commission.

SEC. 3. That the said commission shall cause to be made an accurate map of said Rock Creek Park, showing the location, quantity, and character of each parcel of private property to be taken for such purpose, with the names of the respective owners inscribed thereon, which map shall be filed and recorded in the public records of the District of Columbia, and from and after the date of filing said map the several tracts and parcels of land embraced in said Rock Creek Park shall be held as condemned for public uses, and the title thereof vested in the United States, subject to the payment of just compensation, to be determined by said commission, and approved by the President of the United States: *Provided,* That such compensation be accepted by the owner or owners of the several parcels of land.

That if the said commission shall be unable by agreement with the respective owners to purchase all of the land so selected and condemned within thirty days after such condemnation, at the price approved by the President of the United States, it shall, at the expiration of such period of thirty days, make application to the supreme court of the District of Columbia, by petition, at a general or special term, for an assessment of the value of such land as it has been unable to purchase.

Said petition shall contain a particular description of the property selected and condemned, with the name of the owner or owners thereof, if known, and their residences, as far as the same may be ascertained, together with a copy of the recorded map of the park; and the said court is hereby authorized and required, upon such application, without delay, to notify the owners and occupants of the land, if known, by personal service, and if unknown, by service by publication, and to ascertain and assess the value of the land so selected and condemned, by appointing three competent and disinterested commissioners to appraise the value or values thereof, and to return the appraisement to the court; and when the value or values of such land are thus ascertained, and the President of the United States shall decide the same to be reasonable, said value or values shall be paid to the owner or owners, and the United States shall be deemed to have a valid title to said land; and if in any case the owner or owners of any portion of said land shall refuse or neglect, after the appraisement of the cash value of said lands and improvements, to demand or receive the same from said court, upon depositing the appraised value in said court to the credit of such owner or owners, respectively, the fee-simple shall in like manner be vested in the United States.

SEC. 4. That said court may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order or issue any process for giving possession.

SEC. 5. That no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners. In such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. In all cases as soon as the said commission shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken. All proceedings hereunder shall be in the name of the United States of America and managed by the commission.

SEC. 6. That the commission having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expenses upon the lands, lots, and blocks situated in the District of Columbia specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate.

If said commission shall find that the real estate in said District directly benefited by reason of the location of the park is not benefited to the full extent of the estimated cost and expenses, then they shall assess each tract or parcel of land specially benefited to the extent of such benefits as they shall deem the said real estate specially benefited. The commission shall give at least ten days' notice, in one daily newspaper published in the city of Washington, of the time and place of their meeting for the purpose of making such assessment and may adjourn from time to time till the same be completed. In making the assessment the real estate benefited shall be assessed by the description as appears of record in the District on the day of the first meeting; but no error in description shall vitiate the assessment: *Provided*, That the premises are described with substantial accuracy. The commission shall estimate the value of the different parcels of real estate benefited as aforesaid and the amount assessed against each tract or parcel, and enter all in an assessment book. All persons interested may appear and be heard. When the assessment shall be completed it shall be signed by the commission, or a majority (which majority shall have power always to act), and be filed in the office of the clerk of the supreme court of the District of Columbia. The commission shall apply to the court for a confirmation of said assessment, giving at least ten days' notice of the time thereof by publication in one daily newspaper published in the city of Washington, which notice shall state in general terms the subject and the object of the application.

The said court shall have power, after said notice shall have been duly given, to hear and determine all matters connected with said assessment; and may revise, correct, amend, and confirm said assessment, in whole or in part, or order a new assessment, in whole or in part, with or without further notice or on such notice as it shall prescribe; but no order for a new assessment in part, or any partial adverse action, shall hinder or delay confirmation of the residue, or collection of the assessment thereon. Confirmation of any part of the assessment shall make the same a lien on the real estate assessed.

The assessment, when confirmed, shall be divided into four equal installments, and may be paid by any party interested in full or in one, two, three, and four years, on or before which times all shall be payable, with six per centum annual interest on all deferred payments. All payments shall be made to the Treasurer of the United States, who shall keep the account as a separate fund. The orders of the court shall be conclusive evidence of the regularity of all previous proceedings necessary to the validity thereof, and of all matters recited in said orders. The clerk of said court shall keep a record of all proceedings in regard to said assessment and confirmation. The commission shall furnish the said clerk with a duplicate of its assessment book, and in both shall be entered any change made or ordered by the court as to any real estate. Such book filed with the clerk when completed and certified shall be prima facie evidence of all facts recited therein. In case assessments are not paid as aforesaid the book of assessments certified by the clerk of the court shall be delivered to the officer charged by law with the duty of collecting delinquent taxes in the District of Columbia, who shall proceed to collect the same as delinquent real estate taxes are collected. No sale for any installment of assessment shall discharge the real estate from any subsequent installment; and proceedings for subsequent installments shall be as if no default had been made in prior ones.

All money so collected may be paid by the Treasurer on the order of the commission to any persons entitled thereto as compensation for land or services. Such order on the Treasurer shall be signed by a majority of the commission and shall specify fully the purpose for which it is drawn. If the proceeds of assessment exceed the cost of the park the excess shall be used in its improvement, under the direction of the officers named in section eight, if such excess shall not exceed the amount of ten thousand dollars. If it shall exceed that amount that part above ten thousand dollars shall be refunded ratably. Public officers performing any duty hereunder shall be allowed such fees and compensation as they would be entitled to in like cases of collecting taxes. The civilian members of the commission shall be allowed ten dollars per day each for each day of actual service. Deeds made to purchasers at sales for delinquent assessments hereunder shall be prima facie evidence of the right of the purchaser, and any one claiming under him, that the real estate was subject to assessment and directly benefited, and that the assessment was regularly made; that the assessment was not paid; that due advertisement had been made; that the grantee in the deed was the purchaser or assignee of the purchaser, and that the sale was conducted legally.

Any judgment for the sale of any real estate for unpaid assessments shall be conclusive evidence of its regularity and validity in all collateral proceedings except when the assessment was actually paid, and the judgment shall estop all persons from raising any objection thereto, or to any sale or deed based thereon, which existed at the date of its rendition, and could have been presented as a defense to the application for such judgment.

To pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other necessary expenses incidental thereto, the sum of one million two hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated: *Provided*, That one-half of said sum of one million two hundred thousand dollars, or so much thereof as may be expended, shall be reimbursed to the Treasury of the United States out of the revenues of the District of Columbia, in four equal annual installments, with interest at the rate of three per centum per annum upon the deferred payments: *And provided further*, That one-half of the sum which shall be annually appropriated and expended for the maintenance and improvement of said lands as a public park shall be charged against and paid out of the revenues of the District of Columbia, in the manner now provided by law in respect to other appropriations for the District of Columbia, and the other half shall be appropriated out of the Treasury of the United States.

SEC. 7. That the public park authorized and established by this act shall be under the joint control of the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army, whose duty it shall be, as soon as practicable, to lay out and prepare roadways and bridle paths, to be used for driving and for horseback riding, respectively, and footways for pedestrians; and whose duty it shall also be to make and publish such regulations as they deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury or spoliation of all timber, animals, or curiosities within said park, and their retention in their natural condition, as nearly as possible.

Approved, September 27, 1890.

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In the

Supreme Court of the United States

October Term, 1931.

No. [redacted] 9

LUTHER H. REICHELDERFER, HERBERT B. CROSBY AND JOHN C. GOTWALLS, COMMISSIONERS OF THE DISTRICT OF COLUMBIA,

Petitioners,

vs.

HENRY I. QUINN, GEORGE J. MUELLER, JR., HENRY ORTH, JR., et al.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENTS IN OPPOSITION

JOSEPH A. BURKART,
HENRY I. QUINN,
GEORGE E. SULLIVAN,
Attorneys for Respondents.

Press of The Sudwarth Co., Washington

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 729

LUTHER H. REICHELDERFER, HERBERT B. CROSBY AND JOHN C. GOTWALLS, COMMISSIONERS OF THE DISTRICT OF COLUMBIA,

Petitioners,

vs.

HENRY I. QUINN, GEORGE J. MUELLER, JR., HENRY ORTH, JR., et al.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW.

Two opinions were rendered by the Court of Appeals. The first is reported in 48 App. D. C.

339, and the second in 60 W. L. R. 38. The final judgment of the Court of Appeals was entered December 7, 1931 (Rec. 17).

QUESTIONS PRESENTED.

The questions presented are clearly set forth, and dealt with, in the first opinion of the Court of Appeals (58 App. D. C. 339), making manifest that there is no semblance of interference with the police power such as is contended by petitioners. Respondents' homes are located near the corner of 16th Street and Colorado Avenue, Washington, D. C., in the first and highest grade or class of residentially zoned properties, known as " 'A' Restricted-Area District" (in which fire engine houses, places of incarceration, incinerators, and other inharmonious establishments are in no manner provided for), the permissible residential uses being expressly stated in Section XVa of D. C. Zoning Regulations as follows:

> "for use only as a wholly detached single-family dwelling with two side yards, church, school, or passenger station" (Rec. 3)."

Fire engine houses are not prohibited in first commercial, second commercial, or industrial zoned areas (Rec. 3).

Respondents' said homes are also adjacent to that corner of Rock Creek Park which forms the Northwest corner of said intersection (less than

100 feet from the home of one of the respondents, less than 200 feet from the home of another respondent, and but slightly further distant from the other respondents). It is at said corner of Rock Creek Park that the Commissioners of the District of Columbia have been restrained and enjoined from erecting a fire engine house. It is admitted by stipulation filed in the Court below (Rec. 12) that respondents' predecessor in title was a party to the condemnation proceedings by which Rock Creek Park was secured and established, that a portion of the tract of land owned by her was taken and that the remaining portion of her tract which was not taken, but which was involved in the condemnation proceedings, embraced the property of these respondents. It appears from the Rock Creek Park Act (U. S. Code, Title 40, Sec. 83) that Congress recognized that land so located as was the land of these respondents, would be specially benefited by the location and improvement of Rock Creek Park and the perpetual dedication to use as a park, and provided that adjacent land so benefited should help to defray the costs of acquiring the park. It should be assumed that the Commissioners in charge of the condemnation and the Court under whose jurisdiction the Commission functioned in the institution and conduct of the condemnation proceedings, did their duty and that said land was assessed as required. Even though there had been no such provision for assessment of adjoin-

ing and adjacent properties in the Act authorizing the acquisition of Rock Creek Park, the general principle of law applicable to the acquisition of lands for public uses by condemnation proceedings in the exercise of eminent domain would have required that the award of damages to the respondents' predecessor in title take into consideration by way of deduction from what would otherwise be awarded, the benefits inuring to the portion of her tract which was not taken but which was involved in the said proceedings. In spite of this situation petitioners now contend that the benefits for which the land of the respondents was assessed, which benefits would be estimated as largely due to the perpetual dedication of the land taken to use as a park, can be seriously impaired and practically destroyed without just compensation.

ARGUMENT.

1. Easements are necessarily created in favor of land which is assessed for benefits from a particular public improvement.

> "If in the next instant they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly *legalized robbery* than any other form of acquiring property." *Lahr* v. *Met. E. R. Co.*, 104 N. Y. 268, 291.

2. Respondents, as owners of home properties, adjacent to Rock Creek Park, have rights and easements which cannot be taken away without just compensation, since easements are entitled to same protection as fee title.

> "An easement is an interest in land for which the owner is entitled to compensation, as much so as if the land to which the easement is appurtenant were taken or injured." 20 *Corpus Juris* 655, citing *United States* v. *Welch,* 217 U. S. 333, and many other cases.

Petitioners contend that instead of diverting or changing the use of Rock Creek Park, Congress was enacting legislation to protect and safeguard the park against fire, in order that it could be used and enjoyed by the entire public. The legislation on its face shows that such a contention is groundless. The Act of Congress, 45 Stat. at L. 667, directed the Commissioners of the District of Columbia to sell property owned by the District at the corner of 16th and Webster Streets, N. W., which had been heretofore acquired for a fire engine house site and to pay the proceeds into the Treasury of the United States, and further directed them to erect the fire engine house at 16th and Colorado Avenue on a site located in Rock Creek Park. The Act then provided that "the balance of the appropriations carried in the Acts of May 10, 1926, and March 2, 1927, for an engine house in the vicinity of Sixteenth Street and Piney Branch

Road Northwest, is made available for the purpose aforesaid." The site at 16th and Webster Streets N. W., which Commissioners were directed to sell, was acquired by reason of the provisions of the Acts of May 10th, 1926, and March 2nd, 1927, as such a site was "in the vicinity of 16th Street and Piney Branch Road, N. W." Sixteenth and Webster Streets is eight city blocks South of the site at 16th and Colorado Avenue, and has no relation to or connection with Rock Creek Park. It was undoubtedly selected as a strategic location for the protection of the great apartment house area at 16th and Columbia Road, and it could not be used because of restrictive covenants running with the land. Rock Creek Park had existed for over thirty (30) years without fire protection by reason of the location of an engine house therein, and the necessity to protect and safeguard it against fire so that it could be used and enjoyed by the entire public is recognized for the first time in the brief of the petitioners. It is common knowledge, that fire protection is not deemed so urgent for the parks of the City as to require the location of engine houses therein, and none have been so located.

Certainly the consideration and assessment of benefits against the properties now owned by respondents would not contemplate a fire engine house at their front doors. Those properties were burdened with an assessment which was supposed to purchase an unobstructed view into the park and the peace and quiet and beauty of such surroundings and outlook.

The obnoxious provision for the diversion of the aforesaid corner of Rock Creek Park for use as a site for a municipal fire engine house not only emanated from, but was actually drafted by, the Commissioners of the District of Columbia, and submitted by them with the express explanation that it was to provide a substitute location for the 16th and Webster Streets municipal fire engine site (pp. 104-5 printed hearings District of Columbia Appropriation Bill, 1929, sub-committee of Senate Appropriations Committee on H. R. 11133, March 7, 1928).

The petitioners claim that *Douglass vs. Montgomery*, 118 Alabama 508, and *Cincinnati vs. White*, 6 Pet. 438-8 L. Ed. 452, cited by the Court of Appeals in its opinion, are not in point because in those cases the "entire property" was attempted to be diverted. Whether all or part of Rock Creek Park is diverted to a use different from that to which it was dedicated, does not strengthen or weaken the application of the principle of those cases to the protection of the rights of respondents. It so happens in this case that the particular portion of Rock Creek Park which it is sought to divert to an objectionable use, was and is, the portion which means most to the respondents as a park, and it was the proximity of that portion to respondents' homes and the special damage resulting to them by its diversion that gave them standing to maintain this suit. The entire area acquired under the Rock Creek Park Act was perpetually dedicated as a park, and a diversion of any part of that area to another use violates the letter and spirit of the Act, and "is a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted." *Cincinnati vs. White,* 6 Pet., *supra.*

3. The erection of a fire engine house at the point designated by Congress would be a violation of the letter and the spirit of the Zoning Law and Regulations.

The Zoning Law creates reciprocal rights and liabilities in the use which is limited or prescribed by the said Law or the regulations adopted thereunder. Congress is bound as well as all others to respect the Zoning Law until the same shall be repealed by Congress itself, and the location of a Fire Engine House so near to respondents' home properties (which were zoned for a "restricted" "residential" use only), as to conflict with or seriously affect such use would be plainly arbitrary and unreasonable, and therefore unlawful and unwarranted. This Court in *Euclid vs. Ambler Realty Co.,* 272 U. S. 365, stated that nothing arbitrary and unreasonable can be countenanced. Nothing more arbitrary and unreasonable could be imagined than the utter disregard of the Zoning Regulations of the District of Columbia, which restrict the location of Fire Engine Houses to Commercial and industrial districts, shown by the location of an engine house at the front door of high-class residences in the very heart of a residential district. Its location there would destroy the compensating value and benefits inuring to respondents' properties as residences, and leave them burdened with a restriction which prevented their use and occupation for any other purpose. As aptly stated by the Court of Appeals of the District of Columbia, in *Quinn et al vs. Dougherty et al.*, 58 App. D. C. 340.

> "It may be assumed that the engine house in question could be located outside of this particular residential district and furnish the same public protection that will be afforded if it is established at the point in question. Inasmuch as under the Zoning Regulations no provision is made for the establishment of fire engine houses in residential districts, it must be assumed that the Zoning Commission, in exercising the power conferred on it by Congress, considered the protection adequate by their location in the other districts. It appears in this case that the engine house could have been established at a more strategic point two blocks distant from the present site where it would have been outside of a residential district and with little or no property damage to anyone."

The petitioners, in their brief, assert "The Zoning Regulations were made pursuant to the authority of Congress. Congress if it so desires can change or alter Zoning Laws or Regulations. Any subsequent enactment carrying out this policy, it is submitted, is a valid exercise of the inherent power of Congress to legislate for the District of Columbia." The answer to such a suggestion is that Congress made no attempt to change or alter Zoning Laws or Regulations. The most that can be said is that the Congress attempted to ignore the Zoning Laws and Regulations and the rights of these respondents thereunder, and its action in that respect was arbitrary, unreasonable, unlawful and unwarranted.

4. Authorities cited by petitioners on police power not in point.

The authorities cited by petitioners as sustaining the effectual setting aside or impairment of property rights by virtue of the exercise of the police power, are in nowise in point. *L'Hote* v. *New Orleans*, 177 U.S. 587, involving a restrictive ordinance dealing with a "Red Light District," which this Court held not to infringe property rights because "there is nothing in the ordinance to deny the ordinary right of the individual to restrain a private nuisance" (p. 600). *Hadacheck* v. *Sebastian*, 239 U. S. 394, involved an ordinance excluding the conduct of a brick business from a residence section, just as *Reinman* v. *Little Rock*, 237 U. S. 171, involved a similar exclusion of a livery stable, both being businesses which this Court held could be dealt with as quasi-nuisances when in a residential section because of "the effect upon the health and comfort of the community" (239 U. S. at p. 411).

Surely, no one can seriously contend that respondents' wholly detached private homes located in the first and highest class residential use District of the Nation's Capital are subject to the destruction or impairment of any rights or easements appertaining to the same, by reason of any legislative power to limit or control quasi-nuisances when conducted on private property. The case at bar involves the reverse situation. Here we have an attempt by the public authorities to seriously impair residential property rights, including vested easements and zoning rights, by the injection of that which is plainly a quasi-nuisance in any residential section and which is positively unlawful in the particular residential section here concerned by reason of such vested easements and zoning rights. The real and undeniable situation is clearly stated by the Court of Appeals in *Quinn, et al.* v. *Dougherty, et al, supra.*

> "It appears in this case that the engine house could have been established at a more strategic point two blocks distant from the present site, where it would have been outside of a residential district and with little or no property damage to any one."

At p. 17 of their brief, petitioners assert that "There is no justification in the Record for the statement"; but such denial is not understood, since they necessarily well know the fact, of which the Court will also take judicial notice, that there is an abundance of first commercial land available for the purpose at and in the vicinity of 14th Street and Colorado Avenue, two blocks distant.

CONCLUSION.

It is respectfully submitted that the petition lacks merit, and that respondents ought not to be subjected to further expense in defending themselves, such as would be necessitated by granting of writ of certiorari. If the District Commissioners had any real confidence in their contention that they are excepted from the operation of zoning limitations and restrictions, they ought to have appealed from final decree of the Supreme Court of the District of Columbia entered December 17, 1928, in Equity Cause No. 48,769, *Wimsatt* v. *Dougherty et al.*, restraining the maintenance of a public place of incarceration in a residential zone, a similar arbitrary attempt by District Commissioners to invade and override the rights of citizens.

This Court will doubtless recall the extent to which Commissioners of the District of Columbia subjected another property owner to time, trouble and great expense before she could obtain final relief from confiscation of her moneys collected as a special assessment on account of a public project which was not put through but abandoned (*District of Columbia* v. *Thompson*, 281 U. S. 25, affirming 58 App. D. C. 313). If the District Commissioners can by virtue of their official positions, raise every attempt on their part to disregard the rights of citizens, to the dignity of a public question entitled to special review by this Honorable Court, property owners can not hope for real relief from the Courts, because ultimate victory is necessarily so costly as to constitute financial defeat.

Respectfully submitted,

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HENRY I. QUINN,
GEORGE E. SULLIVAN,
Attorneys for Respondents.

RESPONDENT'S BRIEF

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 9.

LUTHER H. REICHELDERFER, HERBERT B. CROSBY AND JOHN C. GOTWALLS, COMMISSIONERS OF THE DISTRICT OF COLUMBIA,

Petitioners,

vs.

HENRY I. QUINN, GEORGE J. MUELLER JR., HENRY ORTH, JR., et al.,

Respondents.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR RESPONDENTS.

JOSEPH A. BURKART,
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PRESS OF THE SUDWARTH CO., WASHINGTON

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 9.

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vs.

HENRY I. QUINN, GEORGE J. MUELLER, JR., HENRY ORTH, JR., et al.,
Respondents.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

Two opinions were rendered by the Court of Appeals. The first is reported in 58 App. D. C.

339, and the second in 60 App. D. C. 325. The final judgment of the Court of Appeals was entered December 7, 1931 (Rec. 17).

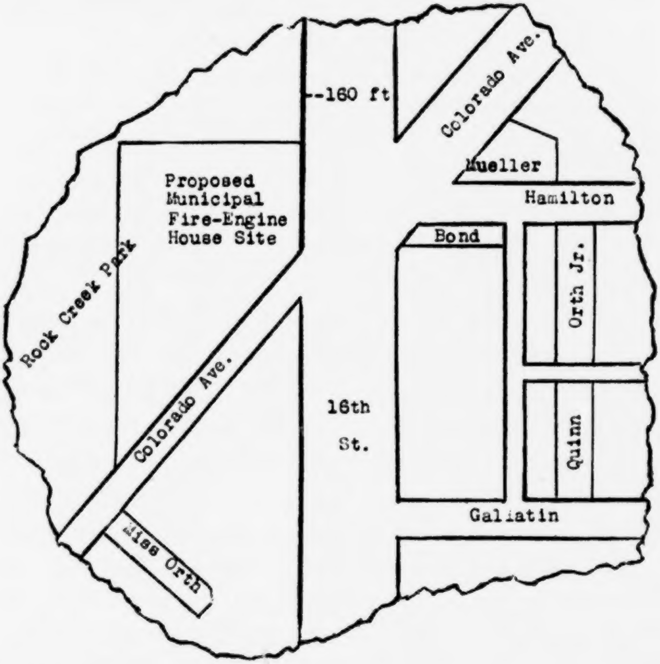
QUESTIONS PRESENTED.

The questions presented are two-fold:

1. Whether the Congress, after perpetually dedicating and setting apart "as a public park or pleasure ground" land abutting, or in proximity to, privately owned land, which latter was treated as specially benefitted, and accordingly specially assessed, due to such proximity, can later impair or withdraw the easement so conferred, *with no judicial means or method provided for the owners seeking and obtaining just compensation for such impairment or withdrawal.*

2. Whether the Congress, after providing by Zoning Law and Regulations (which remain unrepealed) for the zoning of such privately owned land in proximity to such public park or pleasure ground as restricted to the highest class of residential use only, can cause the nearby public park or pleasure ground to be used for purposes rendering the future use of such privately owned land for the highest class of residential use impracticable or impossible, *without providing any judicial means or method for the owners seeking and obtaining just compensation.*

These questions are clearly set forth in the first opinion of the Court of Appeals (58 App. D. C. 339). However, the following simple diagram may be helpful to the Court in grasping very precisely the questions involved.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Hamilton
Proposed Municipal Fire-Engine House Site
Bond
Rock Creek Park
Orth Jr.
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Gallatin
Miss Orth

It will be at once apparent to the Court that, instead of respondents' home properties being located "one city block or more" away (p. 21 petitioners' brief) from the portion of Rock Creek Park concerned, all of the homes of respondents are within several hundred feet, and three of respondents, namely, Miss Orth, Mr. Bond, and Mr. Mueller, now enjoy an unobstructed view of that portion of Rock Creek Park, which view will be seriously obstructed by the proposed municipal fire-engine house. The aforesaid assertion on page 21 of petitioners' brief is also at variance with the admissions in their sworn answer that Miss Orth's home property is "less than one hundred feet away," that Mr. Bond's home property is "less than two hundred feet away," and that the home properties of the other respondents are also located short distances not exceeding about 300 feet as to the most distant (Rec. p. 9).

The final decree which the Court of Appeals of the District of Columbia affirmed, and which is now on review before this Honorable Court, restrained and enjoined the Commissioners of the District of Columbia from erecting a proposed municipal fire-engine house on the portion of Rock Creek Park shown on the above diagram (Rec. p. 13). Petitioners claim authority to proceed with such erection by reason of the following provision in Appropriation Act of Congress of May 21, 1928 (45 Stat. L. 667):

> "The Commissioners of the District of Columbia are hereby authorized and directed to sell the property at the corner of Sixteenth and Webster Streets, heretofore acquired for a fire engine house site at public or private sale at not less than the purchase price paid

> therefor by the District of Columbia and pay the proceeds thereof into the Treasury of the United States, to the credit of the District of Columbia; and the Commissioners are hereby authorized and directed to erect a fire engine house, with furniture and furnishings for a fire engine company, at the northwest corner of Sixteenth Street and Colorado Avenue, on property belonging to the United States, and there is hereby set aside for such purpose a plot of ground running north from the junction of Sixteenth Street and Colorado Avenue, as now publicly owned, one hundred (100) feet on Sixteenth Street, thence west at right angles to the street, one hundred and sixty feet (160), thence south at right angles to the line of Colorado Avenue. The balance of the appropriations carried in the Acts of May 10, 1926, and March 2, 1927, for an engine house in the vicinity of Sixteenth Street and Piney Branch Road Northwest, is made available for the purpose aforesaid."

Petitioners made no claim in either of the Courts below that this proposed municipal fire-engine house was sought to be so located for the protection of Rock Creek Park. On the contrary, petitioners produced Fire Chief Watson before the Subcommittee of the Senate Appropriation Committee on March 7, 1928, to give the following testimony:

> "The territory north of Park Road and extending from Park Road to the District line and from Rock Creek Park over to the

> other side of the Soldiers' Home Park is practically now protected by two engine companies. An adequate response to each fire requires three engine companies and one truck company.
>
> By installing this new engine house in the territory covered from Park Road to the District line, we will be able to retain in the northwest section, which provides the greatest life hazard in the District of Columbia from the fire standpoint, an engine company which now has to leave that territory open in order to cover territory from Park Road to the District line. We will be serving, by the installation of this company, two purposes. We will provide for the territory north of Park Road, extending to the District line, the three companies which should respond, demanded by the citizens as proper protection, and we will also give to this big apartment house section, the protection to which they are entitled. I do not believe that there is any question as to the necessity for the installation of this additional service" (p. 107, Hearings before Subcommittee of Senate Appropriations Committee on H. R. 11133).

It is admitted by stipulation filed herein (Rec. p. 12) that respondents' predecessor in title was a party to the condemnation proceedings by which Rock Creek Park was secured and established about 40 years ago under Rock Creek Park Act (26 Stat. L. 492—U. S. Code, Title 40, Sec. 83), and further that a portion of the tract owned by respondents' said predecessor was taken, and the remaining portion of the tract not taken but involved in the condemnation proceedings embraced the property of these respondents. The said Rock Creek Park Act contained the following express provision:

> "That the commission having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expenses upon the lands, lots and blocks situated in the District of Columbia specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate" (Sec. 6).

Under settled principles, the award to respondents' said predecessor in title for the part of the tract actually taken was necessarily reduced by the amount of benefits inuring to the portion of her tract which was not taken but which was involved in said proceedings.

Under the Zoning Act for the District of Columbia, of March 1, 1920 (41 Stat. L. 500), and the Regulations promulgated thereunder, the area in the vicinity of Rock Creek Park shown in part by the above diagram became part of the first and highest grade or class of residentially zoned properties, known as " 'A' Restricted Area District" (Section XVa D. C. Zoning Regulations)—

> "for use only as a wholly detached single-family or passenger station" (Rec. p. 3),

no provision being made for incinerators, places of incarceration, engine houses, or other obnoxious establishments in residentially zoned areas. There is, however, nothing in the Regulations purporting in anywise to prohibit fire-engine houses in First Commercial, Second Commercial, or Industrial zoned areas.

ARGUMENT.

1. Easements are necessarily created in favor of land which is assessed for benefits from a particular public improvement.

> "If in the next instant they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly *legalized robbery* than any other form of acquiring property." *Lahr* v. *Met. E. R. Co.*, 104 N. Y. 268, 291.

2. Respondents, as owners of home properties, adjacent to Rock Creek Park, have rights and easements which cannot be taken away without just compensation, since easements are entitled to same protection as fee title.

> "An easement is an interest in land for which the owner is entitled to compensation, as much so as if the land to which the easement is appurtenant were taken or injured." 20 *Corpus Juris* 655, citing *United States* v. *Welch*, 217 U. S. 333, and many other cases.

Petitioners contend here, for the first time, that instead of diverting or changing the use of Rock Creek Park, Congress was enacting legislation to protect and safeguard the park against fire, in order that it could be used and enjoyed by the entire public. The legislation on its face shows that such a contention is groundless. The Act of Congress, 45 Stat. at L. 667, directed the Commissioners of the District of Columbia to sell property owned by the District at the corner of 16th and Webster Streets, N. W., which had been heretofore acquired for a fire engine house site and to pay the proceeds into the Treasury of the United States, and further directed them to erect the fire engine house at 16th and Colorado Avenue on a site located in Rock Creek Park. The Act then provided that "the balance of the appropriations carried in the Acts of May 10, 1926, and March 2, 1927, for an engine house in the vicinity of Sixteenth Street and Piney Branch Road Northwest, is made available for the purpose aforesaid." The site at 16th and Webster Streets N. W., which Commissioners were directed to sell, was acquired by reason of the provisions of the Acts of May 10th, 1926, and March 2nd, 1927, as such a site was "in the vicinity of 16th Street and Piney Branch Road, N. W." Sixteenth and Webster Streets is eight city blocks South of the site at 16th and Colorado Avenue, and has no relation to or connection with Rock Creek Park. It was undoubtedly selected as a strategic location for the protection of the great apartment house area at 16th and Columbia Road, and it could not be used because of restrictive covenants running with the land.

Certainly the consideration and assessment of benefits against the properties now owned by respondents would not contemplate a fire engine house at their front doors. Those properties were burdened with an assessment which was supposed to purchase an unobstructed view into the park and the peace and quiet and beauty of such surroundings and outlook.

The obnoxious provision for the diversion of the aforesaid corner of Rock Creek Park for use as a site for a municipal fire engine house not only emanated from, but was actually drafted by, the Commissioners of the District of Columbia, and submitted by them with the express explanation that it was to provide a substitute location for the 16th and Webster Streets municipal fire engine site (pp. 104-5 printed hearings District of Columbia Appropriation Bill, 1929, sub-committee of Senate Appropriations Committee on H. R. 11133, March 7, 1928).

The contention by petitioners, if sanctioned, would be productive of the gravest consequences. If it be no diversion of this public park or pleasure ground or impairment or withdrawal of the benefits to adjacent property owners, to erect a Municipal Fire-Engine House at their front doors, because the fire-engine might on occasions be called into Rock Creek Park it could with equal propriety be claimed that a Municipal Incinerating Plant could be also located adjacent to the Fire-Engine House to destroy trash and garbage of the Nation's Capital along with leaves and trash from Rock Creek Park, or that a Municipal Jail or House of Incarceration could be also so located because such an institution might also be used to house persons committing depredations in Rock Creek Park. In fact, the attitude of the District Commissioners is well known to be so far-reaching, because in the Fall of 1928 they actually attempted to instal a public place of incarceration in one of the best residentially zoned sections of the District, in disregard of the Zoning Law and Regulations, but were halted in their attempt by decree of the Supreme Court of the District of Columbia in Equity Cause No. 48,769, Wimsatt v. Dougherty et al., December 17, 1928.

The petitioners claim that *Douglass vs. Montgomery*, 118 Alabama 508, and *Cincinnati vs.* White, 6 Pet. 438-8 L. Ed. 452, cited by the Court of Appeals in its opinion, are not in point because in those cases the "entire property" was attempted to be diverted. Whether all or part of Rock Creek Park is diverted to a use different from that to which it was dedicated, does not strengthen or weaken the application of the principle of those cases to the protection of the rights of respondents. It so happens in this case that the particular portion of Rock Creek Park which it is sought to divert to an objectionable use, was and is, the portion which means most to the respondents as a park, and it was the proximity of that portion to respondents' homes and the special damage resulting to them by its diversion that gave them standing to maintain this suit. The entire area acquired under the Rock Creek Park Act was perpetually dedicated as a park, and a diversion of any part of that area to another use violates the letter and spirit of the Act, and "is a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted." *Cincinnati vs. White*, 6 Pet., *supra*.

3. The erection of a fire engine house at the point designated by Congress would be a violation of the letter and the spirit of the Zoning Law and Regulations.

The Zoning Law creates reciprocal rights and liabilities in the use which is limited or prescribed by the said Law or the regulations adopted thereunder. Congress is bound as well as all others to respect the Zoning Law until the same shall be repealed by Congress itself, and the location of a Fire Engine House so near to respondents' home properties (which were zoned for "A-Restricted" "residential" use only), as to conflict with or seriously affect such use would be plainly arbitrary and unreasonable, and therefore unlawful and unwarranted. This Court in *Euclid vs. Ambler Realty Co.*, 272 U. S. 365, stated that nothing arbitrary and unreasonable can be countenanced. Nothing more arbitrary and unreasonable could be imagined than the utter disregard of the Zoning Regulations of the District of Columbia, which restrict the location of Fire Engine Houses to Commercial and Industrial districts, shown by the location of an engine house at the front door of high-class residences in the very heart of a residential district. Its location there would destroy the compensating value and benefits inuring to respondents' properties as residences, and leave them burdened with a restriction which prevented their use and occupation for any other purpose. As aptly stated by the Court of Appeals of the District of Columbia, in *Quinn et al vs. Dougherty et al.*, 58 App. D. C. 339:

> "Inasmuch as under the Zoning Regulations no provision is made for the establishment of fire engine houses in residential districts, it must be assumed that the Zoning Commission, in exercising the power conferred on it by Congress, considered the protection adequate by their location in the other districts. It appears in this case that the engine house could have been established at a more strategic point two blocks distant from the present site where it would have been outside of a residential district and with little or no property damage to anyone."

The petitioners, in their brief (p. 20) assert "The Zoning Regulations were made pursuant to the authority of Congress. Congress if it so desires can change or alter Zoning Laws or Regulations. Any subsequent enactment carrying out this policy, it is submitted, is a valid exercise of the inherent power of Congress to legislate for the District of Columbia." The answer to such a suggestion is that Congress made no attempt to change or alter Zoning Laws or Regulations. The most that can be said is that the Congress attempted to ignore the Zoning Laws and Regulations and the rights of these respondents thereunder, and its action in that respect was arbitrary, unreasonable, unlawful and unwarranted.

Any holding that a zoning law or regulation should, or can, be so framed or construed as to restrict private property within a special area against unsuitable or obnoxious uses by private individuals only, but that the municipal authorities may do so with impunity and without compensating those affected, while the private individuals continue to be so restricted and their property rendered thereby unsuitable and unsalable for the zoned uses, is so obviously contrary to the guarantees contained in the Fifth Amendment to the Constitution of the United States, that a discussion of the case of Cincinnati v. Wegehoft, 119 Ohio 136, (cited by petitioners), is not believed to be necessary.

4. Authorities cited by petitioners on police power not in point.

The authorities cited by petitioners as sustaining the effectual setting aside or impairment of property rights by virtue of the exercise of the police power, are in nowise in point. *L'Hote* v. *New Orleans*, 177 U. S. 587, involved a restrictive ordinance dealing with a "Red Light District," which this Court held not to infringe property rights because "there is nothing in the ordinance to deny the ordinary right of the individual to restrain a private nuisance" (p. 600). *Hadacheck* v. *Sebastian*, 239 U. S. 394, involved an ordinance excluding the conduct of a brick business from a residence section, just as *Reinman* v. *Little Rock*, 237 U. S. 171, involved a similar exclusion of a livery stable, both being businesses which this Court held could be dealt with as quasi-nuisances when in a residential section because of "the effect upon the health and comfort of the community" (239 U. S. at p. 411).

Surely, no one can seriously contend that respondents' wholly detached private homes located in the first and highest class residential use District of the Nation's Capital are subject to the destruction or impairment of any rights or easements appertaining to the same, by reason of any legislative power to limit or control quasi-nuisances when conducted on private property. The case at bar involves the reverse situation. Here we have an attempt by the public authorities to seriously impair residential property rights, including vested easements and zoning rights, by the injection of that which is plainly a quasi-nuisance in any residential section and which is positively unlawful in the particular residential section here concerned by reason of such vested easements and zoning rights.

5. Petitioners' untenable contention that respondents' remedy, if any, is at law.

Petitioners' final contention that respondents should pursue their remedy at law, if any, requires only brief notice. The real gravamen of respondents' complaint is that their rights are sought to be invaded and impaired or destroyed without any judicial means or method being provided for respondents to seek and obtain just compensation. There is no tribunal to which respondents can go, except to a Court of Equity, to give injunctive relief under the circumstances. The recent decision of this Honorable Court in *Hurley, Secretary of War*, v. *Kincaid*, 285 U. S. 95, cited by petitioners as an authority in support of their contention, is directly opposed thereto, the ruling there being that, where a judicial means or method *is* provided for the owners seeking and obtaining compensation, they will be relegated to such remedy.

CONCLUSION.

It is submitted that the decree below is right, and should be affirmed.

Respectfully submitted,

JOSEPH A. BURKART,
HENRY I. QUINN,
GEORGE E. SULLIVAN,
Attorneys for Respondents.

IN THE

Supreme Court of the United States

October Term, 1932.

NO. 9.

LUTHER H. REICHELDERFER, HERBERT B. CROSBY AND JOHN C. GOTWALS, COMMISSIONERS OF THE DISTRICT OF COLUMBIA,

Petitioners,

VS.

HENRY I. QUINN, GEORGE J. MUELLER, JR., HENRY ORTH, JR., et al

Respondents.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

PETITION BY RESPONDENTS FOR RE-HEARING.

JOSEPH A. BURKART,
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GEORGE E. SULLIVAN,

Attorneys for Respondents.

PRESS OF THE SUDWARTH CO., WASHINGTON

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Respondents.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

PETITION BY RESPONDENTS FOR RE-HEARING.

Come now Henry I. Quinn, and others, respondents herein, and respectfully petition the

Court to grant a re-hearing in the above case, which was decided December 5, 1932, the grounds therefor being:

1. The decision announced by the Court is based upon a new proposition not advanced by petitioners, and the cases cited by the Court in support thereof were not previously mentioned in the case, so that no opportunity has been afforded to discuss and analyze such cases.

2. Such new proposition has been the subject of conflicting decisions in different states for a long period, and, consequently, the ultimate pronouncement with respect thereto by the highest Court ought not to be made without an opportunity for full argument.

3. Such new proposition, as applied to this case, involves consequences which are opposed to prior decisions of this Court, as also to the precise provision in the Rock Creek Park Act declaring a perpetual dedication.

4. Should the Court re-affirm its decision, after respondents shall have been afforded an opportunity to argue such new proposition before the Court, the granting of an opportunity for such argument would not

> contravene, but be in accord with, the scrupulous regard which the Court has always shown for the rights of litigants before it.

Concisely stated, such new proposition is:

> That the right to discontinue, or change the use of, a particular public improvement, when betterments were by reason of it assessed, is as absolute as when no betterments were assessed, and regardless of whether the improvement be in its nature transitory or permanent, or was declared in the Act creating it to "be perpetually dedicated."

The authorities cited by the Court as supporting such proposition, and none of which were previously mentioned in the case, include: United States v. River Rogue Co., 269 U. S. 411; Thayer v. City of Boston, 206 Fed. 969; Stanwood v. Malden, 157 Mass. 17; Whitney v. New York, 96 N. Y. 240; Seattle Land etc. Co. v. Seattle, 37 Wash. 274; and 1 Nichols Eminent Domain (2d ed.) Sec. 116.

In United States v. River Rouge Co., 269 U. S. 411, supra, this Court Reversed the Circuit Court of Appeals for the Sixth Circuit for holding—

> That a riparian owner on the improved river would have merely such uncertain and

> contingent 'privileges' of access to the navigable stream and of constructing docks fronting on the harbor line, as the government, in the exercise of an absolute control over the navigation of the river, might see fit to allow him," (page 420).

and in so reversing said holding this Court quoted with approval from Yates v. Milwaukee, 10 Wall. 504, decided in 1870, as follows:

> "This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired.

So far from this Court holding, in either of those cases, that a diversion to a wholly different use could be justified without compensating a party previously assessed for betterments, it was distinctly held that anything later done even within the limits of the particular established use must exclude whatever would be arbitrary or capricious.

The case of Thayer v. City of Boston, 206 Fed. 969, supra, arose in Massachusetts in which State the rule had long been established by decisions of the State courts, that assessments for benefits conferred only a speculative right as to the future, in the absence of special terms and circumstances giving the parties assessed the right to understand that they were paying for something of a permanent nature. That case involved a public park established without the use of any language declaring a perpetual dedication restricted to such use, and the Court in administering the Massachusetts law, as it was obliged to do in that case, said:

> "In the present case, there was no dedication of the park land, nor any acquisition of it by the city, upon a trust imposed by former owners. The plaintiff has, in the first place, to show that the assessments upon adjacent properties, including hers, were levied and paid *upon terms and under circumstances which fairly gave those assessed owners who paid them, or subsequent purchasers, the right to understand that they were then being assessed and were paying for nothing less than the perpetual maintenance of an adjacent park, consisting of the land acquired by the city as stated.*" (p. 973).

In Stanwood v. Malden, 157 Mass. 17, supra, the reason for the long established rule in Massachusetts was explained as follows:

> "It would have been intelligible for the legislature to say that, when a benefit is conferred upon a landowner, the value of which he does not pay for, he takes it upon the implied condition that he shall not be paid for it when it is taken away. *It will be remembered that there were no betterment laws when the meaning of this Act was settled.*" (pp. 18-19).

Obviously, no injustice has been done to anyone in Massachusetts by the establishment and uniform recognition of the rule prevailing there, since betterment assessments have not extended beyond the rule, the condemnation juries being instructed that speculative rights only were conferred.

In Whitney v. New York, 96 N. Y. 240, supra, decided in 1884, a canal, after becoming obsolete and useless, was abandoned, and an adjoining owner sought damages. The Court said:

> "If it was given up as of no use, the owners of the land and their grantees had received all the advantages of the benefits to be derived from the taking of the land, as the determination of the appraisers evidences, and the presentation of an additional claim for damages at this late day rests upon no legal or equitable principles." (p. 246).
>
> "Nor is there any ground for the assumption that the canal appraisers, in fixing the amount of damages which the owners sustained, and in considering the probable benefits which might accrue by reason of the construction of the canal, based their estimate upon the theory that the canal was to be used and operated for all future time. It is a legitimate inference that they considered that the time which it might be used might depend upon unforeseen contingencies, and that in the progress of improvement the period might arrive when, as a means of transportation, the canal would be useless and of no account." (p. 245).

The limited holding in that case is further made manifest by the subsequent decision of the same Court, in 1887, 3 years later, in Lahr v. Met. El. R. Co., 104 N. Y. 268, 290-1:

> "The claim made that the owner of property taken for a street obtains, through the award of the commissioners, full compensation for his property is unfounded, unless the benefits for which he is assessed, are *inviolably* secured to him by such proceedings. *Any other construction of the statute would render it an efficient engine of fraud and injustice.*"

Moreover, when in a still later case, Muhlker v. N. Y. & Harlem R. Co., 173 N. Y. 549, the Court of Appeals of New York sought to depart from the settled law in New York as laid down in Story v. N. Y. El. R. Co., 90 N. Y. 122, and Lahr v. Met. El. R. Co., supra, such attempt was set aside and held for naught by this Honorable Court, in Muhlker v. N. Y. & Harlem R. Co., 197 U. S. 544, in an opinion by Justice McKenna, stating:

> "When the plaintiff acquired his title those cases were the law of New York, and assured him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation." (p. 570).
>
> "We are not called upon to discuss the power, or the limitations upon the power, of the court of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot

> be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract." (p. 570).

The case of Seattle Land etc. Co. v. Seattle, 37 Wash. 274, supra, is also *not* an authority in support of the proposition under discussion, but expressly recognizes the contrary rule, the Court saying:

> "It is doubtless the law that, where a person dedicates or donates to a city a tract of land, with a restriction upon its use—as for instance, where it is so dedicated or donated solely for a park or a public street,—the city cannot legally divert the use of such property to uses and purposes inconsistent with the purpose of such grant; and, *in cases where a city acquiring property for the purpose of a public park, and the payment thereof is made by means of special assessments levied upon neighboring property specially benefited by reason of the acquiring and using of said property for such purpose, that the owners of said property, thus specially assessed, may in a proper case, prevent such property from being used in a manner that would destroy its use and enjoyment for the purposes for which it was acquired.*" (pp. 276-7).

In Vol. 1 Nichols, Eminent Domain, Sec. 116, supra, the author discusses quite clearly the radically differing rules prevailing in different States as to "Discontinuance or Change of Use when Betterments have been Assessed," and cites a number of cases in support of each rule, the text concluding as follows:

> "*The question has never been before the Supreme Court of the United States and the few states in which it has arisen are about evenly divided.* If the subject is one upon which a definite rule can be laid down, in deciding what that rule should be it is essential to note the distinction between an assessment for the establishment of a public improvement and an assessment for the construction or maintenance of a public improvement. In the latter case nothing for which an assessment is levied is in the nature of things permanent; streets, sidewalks and sewers wear out and must be replaced; the benefit from street watering is even more transitory, and it would be absurd to contend that the owners of land which had been assessed a part of the cost of constructing a sidewalk, a sewer or a street were constitutionally entitled to have the work replaced over and over again at the public expense whenever its usefulness had come to an end from natural causes. *The legal establishment of a public improvement and especially of such an improvement as a park is in the nature of things permanent; it needs no renewal; it is its expected permanency that leads people to build in proximity to it and gives the increased value upon which the special assessment is based.* The distinction between an assessment for establishing a public work

> and an assessment for construction is recognized and discussed in several Massachusetts cases. The decisions that sustain an assessment for a transitory benefit merely recognize that an improvement which is in its nature transitory may be the subject of a special assessment, and do not intimate that an improvement which is in its nature permanent, and is treated as permanent in fixing the amount of the assessment, may be treated as transitory whenever it suits the convenience of the municipal authorities. It may be that it is here that the true distinction lies and that it is only an assessment for establishment that gives the owner of land assessed a vested right in the continuance of the improvement; but whatever his rights may be, like all other property they can of course be taken by eminent domain upon payment of compensation if the public needs require it."

It will thus be seen that, so far from Mr. Nichols' work on Eminent Domain cited by this Court in its opinion, supporting the proposition aforesaid, it is very clearly explained therein why the contrary rule is deemed to be the sounder and better one.

It must be conceded that no previous decision of this Court has ever maintained that the public authorities may, without payment of compensation to parties previously assessed for betterments, divert to a wholly different use land dedicated to the particular public improvement concerned. It is, accordingly, respectfully submitted that, if such an absolute and unrestricted right is to be recognized in this case, it should, at least, not be done without an opportunity for full argument on the proposition, both in printed briefs and oral argument. Petitioners advanced no such proposition in their brief, but contended instead (1) that respondents' rights could be obliterated without compensation through the exercise of the police power (pp. 7-17), and (2) that no diversion to a different use would take place by the attempted conversion of that corner of Rock Creek Park into a Municipal Fire Engine House (pp. 17-19). The cases cited in respondents' brief were naturally limited to meeting the propositions advanced by petitioners, and did not undertake to cover the broader proposition aforesaid which counsel on neither side regarded as being here involved. Petitioners, doubtless, felt that it would be futile to urge such broader proposition upon this Court, in view of this Court's refusal, in United States v. River Rogue Co., supra, to sanction the rule that betterments for which assessments are levied are mere "uncertain and contingent 'privileges'" which may be arbitrarily or capriciously destroyed or impaired, this Court re-affirming, instead, the doctrine of property rights laid down as early as 1870 in Yates v. Milwaukee, supra, as contradistinguished from the wholly speculative future rights recognized in Massachusetts and a few other States.

Moreover, it is confidently believed that, upon full argument, this Court will become convinced that, regardless of its power to change or modify, insofar as *future cases* are concerned, the principles laid down in Yates v. Milwaukee, supra, and United States v. River Rogue Co., supra, it ought not to be, and will not be, disposed to make any change or modification to the prejudice of *past cases*, such as respondents,' any more than this Court felt at liberty (which it did not) to permit the Court of Appeals of New York, in Muhlker v. N. Y. & Harlem R. Co., 197 U. S. 544, to change or modify, to the prejudice of past cases, previous rulings by said New York Court affecting property rights.

The opinion filed herein December 5, 1932, treats as facts (1) that the proposed Municipal Fire-Engine House will divert that portion of Rock Creek Park from park uses, (2) that the presence of such structure will diminish the attractiveness of respondents' lands for residence purposes and, in consequence, decrease their exchange value, (3) that lands, including those now owned by respondents, were assessed for benefits as directed by the Rock Creek Park Act of 1890, which expressly declared the Park to "be perpetually dedicated," and (4) that respondents acquired rights commensurate with the assessments authorized. Such declaration of perpetual dedication was not necessary to the protection of the rights of the parties assessed (and their successors in title) except as an extra precaution to avoid possible question even under the very strict rule prevailing in Massachusetts (Thayer v. City of Boston, supra). Did Congress take such extra precaution in order to insure the collection of full betterments on the basis of such perpetual dedication, or did Congress intend such declaration to be without any real legal effect? Whatever Congress may have intended, it would seem to be manifest that the assessments were made (in the language of Thayer v. City of Boston, supra) "upon terms and under circumstances which fairly gave those assessed owners who paid them, or subsequent purchasers, the right to understand that they were then being assessed and were paying for nothing less than the *perpetual maintenance* of an adjacent park." It is respectfully submitted that it is now too late, after the lapse of more than 40 years, to entertain the suggestion, for the first time, that the condemnation commission ought to have been instructed by the Court in that case, or that the adjacent property owners ought to have endeavored to have the Court rule, or to have persuaded the condemnation commission, that something less than perpetual establishment of the park was provided for in the Act. While one Congress cannot bind a subsequent Congress as to legislative acts which have not ripened into contracts, it is well settled that one Congress can (equally with a State Legislature) make contracts binding upon the Government and which cannot be obliterated by a subsequent Congress without compensation. Dartmouth College v. Woodward, 4 Wh. 518; Sinking Fund Cases, 99 U. S. 700.

It is respectfully submitted that a re-hearing should be granted in this case, not only in justice to these respondents, but in justice to the Court itself, which ought to have the benefit of full argument from opposing counsel before finally disposing of a proposition of such far-reaching consequences, seriously affecting property owners throughout the United States, and affecting with equal, or greater, seriousness the Government itself in future condemnation cases involving necessarily reduced betterment assessments if such proposition be maintained. It is suggested that a suitable time be fixed for filing of printed briefs in advance of the re-argument, if granted.

Respectfully submitted,

Joseph A. Burkart,
Henry I. Quinn,
George E. Sullivan,
Attorneys for Respondents.

DEC 30 1932

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Joseph A. Burkart,

Henry I. Quinn,

George E. Sullivan,
Attorneys for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 9.—OCTOBER TERM, 1932.

Luther H. Reichelderfer, Herbert B. Crosby, and John C. Gotwals, Commissioners of the District of Columbia, Petitioners,
vs.
Henry I. Quinn, George J. Mueller, Jr., Henry Orth, Jr., et al.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[December 5, 1932.]

Mr. Justice STONE delivered the opinion of the Court.

This case is here on certiorari, 285 U. S. 535, to review a decree of the Court of Appeals of the District of Columbia, 53 F. (2d) 1079. Following its earlier decision in *Quinn* v. *Dougherty*, 30 F. (2d) 749, that court affirmed a decree of the Supreme Court of the District, enjoining the petitioners, the District Commissioners, from erecting a fire engine house in Rock Creek Park at a point near the property of some of the respondents, and adjoining that of others.

The Commissioners are directed by Act of Congress, 45 Stat. 667, to build the engine house at the designated location within the park. The presence of such a structure will, it is admitted, diminish the attractiveness of respondents' lands for residence purposes and, in consequence, decrease their exchange value. Respondents contend that they have a valuable right appurtenant to their land, in the nature of an easement, to have the land used for park purposes, and that the Act of Congress, directing its use for other purposes, is a taking of their property without just compensation in violation of the Fifth Amendment.

For present purposes we assume that the proposed building will divert the land from park uses, and address ourselves to the question upon which the other issues in the case depend, whether the respondents, plaintiffs in the trial court, are vested with the right for which they invoke constitutional protection.

There is no contention that such a right arises as an incident to the ownership of neighboring land, as does an easement of light and air, under the law of some states. See *Muhlker* v. *Harlem Railroad Co.*, 197 U. S. 544, 564; compare *Marchant* v. *Pennsylvania Railroad*, 153 U. S. 380. But it is argued that the right asserted, whether it be regarded as arising from a contract with the government or an interest in its lands, has a definite source in the transaction by which the park was created.

The court below found this source in the first paragraph of the Rock Creek Park Act, 26 Stat. 492, by which the lands taken for the park by purchase or condemnation were "perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States . . .", and in the assessment under § 6[1], of surrounding lands, including those of respondents, to the extent that they were "specially benefited by reason of the location and improvement" of the park. The question is thus one of construction of the statute; if it did not create the private rights asserted, it is unnecessary to invoke the police power, as petitioners do, to justify the construction of the engine house. Cf. *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31.

First. The respondents derived no rights against the government from the dedication of the park alone. The park lands purchased or condemned by authority of the Rock Creek Park Act were vested in the United States in fee. Section 3 of the Act twice declares that "the title" and once that "the fee" of the condemned lands shall vest in the United States. By dedicating the lands thus acquired to a particular public use, Congress declared a public policy, but did not purport to deprive itself of the power to change that policy by devoting the lands to other uses. The dedication expressed no more than the will of a particular Congress which does not impose itself upon those to follow in succeeding years. See *Newton* v. *Commissioners,* 100 U. S. 548, 559; *Mutual Life Insurance Co.* v. *Spratley,* 172 U. S. 602, 621.

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[1] "Sec. 6. That the commission having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expenses upon the land, lots, and blocks situated in the District of Columbia specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate.

"If said commission shall find that the real estate in said District directly benefited by reason of the location of the park is not benefited to the full extent of the estimated cost and expenses, then they shall assess each tract or parcel of land specially benefited to the extent of such benefits as they shall deem the said real estate specially benefited. . . ."

It is true that the mere presence of the park may have conferred a special benefit on neighboring owners and enhanced the value of their property. But the existence of value alone does not generate interests protected by the Constitution against diminution by the government, however unreasonable its action may be. The beneficial use and hence the value of abutting property is decreased when a public street or canal is closed or obstructed by public authority, *Meyer* v. *Richmond,* 172 U. S. 82, 95; cf. *Whitney* v. *New York,* 96 N. Y. 240; *Fox* v. *Cincinnati,* 104 U. S. 783; *Kirk* v. *Maumee Valley Co.,* 279 U. S. 797, 802, 803; *Smith* v. *City of Boston,* 7 Cush. 254; *Stanwood* v. *Malden,* 157 Mass. 17, or a street grade is raised, *Smith* v. *Washington,* 20 How. 135; see *Mead* v. *Portland,* 200 U. S. 148, 162, or the location of a county seat, *Newton* v. *Commissioners, supra,* or of a railroad is changed. *Bryan* v. *Louisville & N. R. Co.,* 244 Fed. 650, 659. But in such cases no private right is infringed.[2]

Beyond the traditional boundaries of the common law only some imperative justification in policy will lead the courts to recognize in old values new property rights. Compare *International News Service* v. *Associated Press,* 248 U. S. 215, with *Cheney Bros.* v. *Doris Silk Corporation,* 35 F. (2d) 279. The case is clear where the question is not of private rights alone, but the value was both created and diminished as an incident of the operations of the government. For if the enjoyment of a benefit thus derived from the public acts of government were a source of legal rights to have it perpetuated, the powers of government would be exhausted by their exercise.

The case of a park is not unique as the court below seems to have thought.[3] See *Quinn* v. *Dougherty,* 30 F. (2d) 749, 751. It has often been decided that when lands are acquired by a governmental body in fee and dedicated by statute to park purposes, it is within the legislative power to change the use, *Clark* v. *City of Providence,* 16 R. I. 337; *Mowry* v. *City of Providence,* 16 R. I. 422; *Seattle Land & Improvement Co.* v. *Seattle,* 37 Wash. 274; *Reichling* v. *Covington Lumber Co.,* 57 Wash. 225; see *Higginson* v. *Treasurer etc. of Boston,* 212 Mass. 583, or to make other disposition of the land. *Wright* v. *Walcott,* 238 Mass. 432; see *The Brooklyn Park Commission* v. *Armstrong,* 45 N. Y. 234, 245; compare *East Chicago Co.* v. *City of East Chicago,* 171 Ind. 654; *Whitney* v. *New York, supra; Eldridge* v. *City of Binghamton,* 120 N. Y. 309. The abutting owner cannot complain; the damage suffered by him "though greater in degree than that of the rest of the public, is the same in kind". See *United States* v. *Welch,* 217 U. S. 333, 339.

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[2] Compare the decisions holding that access to a water line may be destroyed in the interest of navigation, Gibson *v.* United States, 166 U. S. 269; Scranton *v.* Wheeler, 179 U. S. 141; cf. Greenleaf Lumber Co. *v.* Garrison, 237 U. S. 251, or a tract of land, unrelated to that taken, incidentally damaged, Sharp *v.* United States, 191 U. S. 341; cf. Richards *v.* Washington Terminal Co., 233 U. S. 546, 553, 554, without payment of compensation.

[3] A different question is presented in the cases relied on by the court below which indicate that a dedication of land to the public, by an individual, or

Second. The fact that lands, including those now owned by respondents, were assessed for benefits, as directed by the Rock Creek Park Act, leads to no different conclusion. Respondents urge that the special benefits required to be assessed included those accruing from the perpetual maintenance of the park; that by virtue of the assessment they have paid for the right to enjoy those benefits in perpetuity. We may assume that the landowners acquired rights commensurate with the assessments authorized. But the statute does not purport to place restrictions on the park lands in their favor, and the decision of this Court sustaining the constitutionality of the assessment provision (*Wilson* v. *Lambert,* 168 U. S. 611), gives no hint that among the benefits for which they were required to pay was a right against the government to have the lands forever used as a park.

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a conveyance to a municipality, to be used as a park, is subject to a condition or imposes a trust that the use be continued, breach of which may be restrained. Douglass *v.* City of Montgomery, 118 Ala. 599; cf. City of Cincinnati *v.* White, 6 Pet. 431; Sheffield & Tuscumbia Street Ry. *v.* Rand & Moore, 83 Ala. 294; see also, Village of Riverside *v.* MacLain, 210 Ill. 308; Price *v.* Thompson, 48 Mo. 361; 3 Dillon, Municipal Corporations (5th ed.), § 1102. There, rights in the land or against the municipality were said to have been reserved in the grantor or created in the owners of neighboring land by the terms of the grant.

Equally distinguishable are the decisions which likewise deal with the authority of a municipality, not the power of the legislature, to divert park lands from park uses, but in which the lands were acquired by unrestricted purchase or by eminent domain. See 3 Dillon, *supra,* §§ 991, 1023.

All that the statute says is that the lands acquired shall be perpetually dedicated as a park for the enjoyment of the people of the United States (¶ 1) and that benefits shall be assessed (§ 6). Statutes said to restrict the power of government by the creation of private rights are, like other public grants, to be strictly construed for the protection of the public interest. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544-548; *Christ Church* v. *County of Philadelphia*, 24 How. 300; *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22, 33; *Larson* v. *South Dakota*, 278 U. S. 429. Thus construed, the dedication of the park, a declaration of a present purpose, does not imply a promise to neighboring land-owners that the park would be continued in perpetuity. Cf. *Newton* v. *Commissioners, supra.* The benefit of a governmental obligation which the statute neither expresses nor implies obviously was not to be assessed.

We think that the benefits intended must be taken to be those obvious advantages which would accrue to lands in the vicinity of a park, because of their location, and which would be reflected in their market value, even though there were no guaranty that the park would be continued for any particular length of time.[4] See *Wilson* v. *Lambert, supra*, 617; cf. *Susquehanna Power Co.* v. *State Tax Commission of Maryland*, 283 U. S. 291, 296; *Burbank* v. *Fay*, 65 N. Y. 57, 64. So it was held in *Thayer* v. *City of Boston*, 206 Fed. 969, where contentions very similar to those made here were rejected. See also *The Brooklyn Park Commission* v. *Armstrong*, *supra*, 245. The same result has been reached with regard to the assessment of benefits arising from other types of public improvements, *Whitney* v. *New York, supra,* 246; *City of Chicago* v. *Union Building Assn.,* 102 Ill. 379, 397; *Kean* v. *City of Elizabeth,* 54 N. J. L. 462, affirmed 55 N. J. L. 337; see *Home for Aged Women* v. *Commonwealth,* 202 Mass. 422, 429, 430; 1 Nichols, Eminent Domain (2d ed.), § 116, and is implicit in the statement, frequently made, that such assessments are an exercise of the taxing power. See *Bauman* v. *Ross,* 167 U. S. 548, 588; *Wilson* v. *Lambert, supra,* 614; *Memphis & Charleston Ry.* v. *Pace,* 282 U. S. 241, 245.

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[4] As originally introduced and reported, the bill authorizing and establishing the park (S. No. 4, 51st Cong., 1st Sess.) had no provision for the assessment of benefited property. 21 Cong. Rec. 96, 353, 902, 1109, 2371, 2578-90. Such a method of financing was suggested by Representative Payson, *ibid.* 2580, who offered an amendment embodying this plan, *ibid.* 3939, which, after conference, was adopted, in substance, as § 6. See *ibid.* 3952-3, 5300-3, 5673, 5902-3, 5988, 6163, 10417-9, 10457-8, 10441-4. In explaining the assessment provision on the floor, Mr. Payson said: "Suppose that a man owns a piece of property, distant, we will suppose, a quarter of a mile from the park and that piece of property is worth today $1,000. Now, if by reason of the expenditure made by the Government in this great public improvement this man's property should become, in the judgment of the commission, worth $2,000, the direct benefit thus arising to the property would be assessed against it to assist in paying for the proposed improvement". *Ibid.* 3940.

The possibility that the United States might, at some later date, rightfully exercise its power to change the use of the park lands, so far as it affected present value, was a proper subject for consideration in valuing the benefits conferred. Cf. *United States* v. *River Rouge Co.,* 269 U. S. 411; *Sears* v. *Street Commissioners,* 180 Mass. 274, 282; *Whitney* v. *New Work, supra*; 1 Nichols, Eminent Domain, supra.

Property was not taken without just compensation by either the Rock Creek Park Act or the statute authorizing the construction of the fire house. The only taking occurred when the lands were condemned for the park. Just compensation, the value at that time, *Vogelstein & Co.* v. *United States,* 262 U. S. 337; *United States* v. *New River Collieries Co.,* 262 U. S. 341, 344, was awarded if the benefits resulting from the proximity of the improvement, valued as the Act prescribed, were, as respondents assert, set off against the value of the property taken from the same owners. *Bauman* v. *Ross, supra*; *Whitney* v. *New York, supra; Eldridge* v. *City of Binghamton, supra;* see *Matter of City of New York,* 190 N. Y. 350, 357, 360.

We note but do not discuss at length, the objection that the statute authorizing the construction of the fire house is invalid because inconsistent with regulations under the Zoning Act for the District (41 Stat. 500), setting apart the area in the vicinity of the park for residental properties of the highest class. It is enough to say that the zoning regulations are not contracts by the government and may be modified by Congress. The record and briefs disclose no facts which require us to consider how far the exercise of the power to modify may be subject to constitutional limitations.

Reversed.